

THE YEAR IN REVIEW 2018

SELECTED CASES FROM THE ALASKA SUPREME COURT AND THE ALASKA COURT OF APPEALS

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INTRODUCTION

The *Alaska Law Review*'s Year in Review is a collection of brief summaries of selected state and federal appellate cases concerning Alaska law. They are neither comprehensive in breadth, as several cases are omitted, nor in depth, as many issues within individual cases are omitted. Attorneys should not rely on these summaries as an authoritative guide; rather, they are intended to alert the Alaska legal community to judicial decisions from the previous year. The summaries are grouped by subject matter. Within each subject, the summaries are organized alphabetically.

ADMINISTRATIVE LAW

Alaska Public Defender Agency v. Superior Court

In *Alaska Public Defender Agency v. Superior Court*,¹ the court of appeals held the Public Defender Agency or the Office of Public Advocacy must pay for an indigent defendant's travel to the site of their trial, including the expenses of a parent accompanying a minor who is unable to travel alone, if the defendant is (1) not in custody and (2) unable to afford transportation to trial. J.B., a minor defendant represented by the Public Defender Agency, lives in Marshall and lacked the funds to travel with a parent to Bethel to appear at his trial. The superior court ordered the Public Defender Agency to pay for J.B. and his parent's travel. The Agency appealed, arguing that either the Division of Juvenile Justice or the Court System should be responsible those expenses. The court of appeals affirmed the superior court's order, reasoning that the case presented a question of administration best decided by deferring substantially to the state agencies responsible for administering the Public Defender Agency's authorizing statute. The court referenced two Alaska Attorney General opinions issued in 1977 and 1978 respectively, declaring that the Public Defender Agency is responsible for the transportation costs of indigent defendants, including juveniles. The court of appeals reasoned that these opinions supported the Division of Juvenile Justice's argument that travel expenses are a necessary "service" or "facility" of representation, required to be paid by the Public Defender Agency according to its authorizing statute. The court also relied on a Department of Administration regulation that the court interpreted as accepting the Attorney General's opinion. Affirming the lower court's decision, the court of appeals held that the Public Defender Agency must pay the transportation expenses of an indigent defendant, not in custody, who cannot afford to travel to their trial. The Agency must also pay for the expenses of a parent accompanying a minor defendant who cannot travel alone.

Corkery v. Municipality of Anchorage

In *Corkery v. Municipality of Anchorage*,² the supreme court held that section 21.15.010 of the Anchorage Municipality Code (AMC) requires property owners to substantially satisfy each one of its seven standards to obtain a zoning variance. In 1965, the Corkerys' lot was zoned so that, at maximum, 30% of the surface could be covered by a structure. However, in 1983 a prior owner expanded the house beyond this limit without a variance. In 2013, when rot was found in a wall, the Corkerys applied for a permit to rebuild that section of the home. The Municipality issued a permit conditioned on the Corkerys first obtaining a zoning variance for the exceeded limit. However, the zoning board denied the Corkerys' application for a variance because it found three of seven requirements for a variance were not met. On appeal the Corkerys argued that the code only required applicants "substantially" meet the seven criteria as a whole, and by meeting four of them they had done so. The Supreme Court disagreed. The court reasoned that though the code's requirement that an application "substantially meet[] the . . . standards" could be read as the Corkerys argued, it was more natural to read it to require applicants substantially meet each of the seven standards individually. The court explained that this reading was supported by the individual listing of each factor, that two of them operated interdependently, and that a separate portion of the municipal code (which should be interpreted to create a harmonious whole) implied that in reviewing an application the board must find each of the seven criteria to be substantially satisfied.

¹ 413 P.3d 1221 (Alaska Ct. App. 2018).

² 426 P.3d 1078 (Alaska 2018).

The court concluded that the word “substantially” was not made superfluous by this interpretation as it meant applicants need not satisfy each factor in full. Affirming the lower court’s decision, the supreme court held that section 21.15.010 of the AMC requires property owners to substantially satisfy each one of its seven standards to obtain a zoning variance.

Eberhart v. Alaska Pub. Offices Comm’n

In *Eberhart v. Alaska Pub. Offices Comm’n*,³ the Supreme Court of Alaska held that Section 15.13.145 of the Alaska Statutes prohibits the use of both a public entity’s cash and its non-monetary resources for the purpose of influencing a state or municipal election of a state or municipal candidate. AS 15.13.145(a)(4) prohibits elected officials from using “money held by the entity [they work for] to influence the outcome of the election of a candidate to a state or municipal office.” Eberhart allegedly used his city email address during his mayoral campaign to email the city clerk to request all of the ordinances and resolutions that he and his opponent had sponsored. APOC opened an investigation and concluded that most of Eberhart’s emails were permissible under AS 15.13.145; however, it identified Eberhart’s email exchange with the clerk as a possible violation. APOC imposed a \$37.50 fine because the cost of sending the emails to the clerk was *de minimus* and did not cause significant public harm; Eberhart appealed. The Supreme Court of Alaska found that the phrase “to influence the outcome of the election” does not require proof of actual influence as the word “to” can be understood to mean “for the purpose of.” Further, the court found that it was reasonable for APOC to interpret the term “money” to include property and assets including the city’s email system. The court explained that it was unlikely that the legislature intended to ban public cash from being used to influence a candidate while allowing public non-monetary resources to be used for the same purpose. Affirming the superior court’s decision, the Supreme Court of Alaska held that that AS 15.13.145 prohibits the use of both a public entity’s cash and its non-monetary resources for the purpose of influencing the outcome of the election of a state or municipal candidate.

Griswold v. Homer City Council

In *Griswold v. Homer City Council*,⁴ the Supreme Court of Alaska held that the attorney-client and work-product privileges are state law exceptions to section 40.25.120 of the Alaska Statutes (the Alaska Public Records Act), and that communications between members of quasi-judicial bodies and their supporting staff are protected by deliberative process privilege. After a decision by the Homer Board of Adjustment, Frank Griswold submitted two public records requests, the first for communications between the Board and its advisor, attorney Holly Wells, and the second for the Board’s invoices from the law firms Birch Horton and Levesque. The Board refused to provide the communications citing deliberative process and attorney-client privilege, and though it provided some invoice information it withheld much of it again citing attorney-client privilege. Griswold appealed arguing that the communications were not privileged because Wells was a neutral advisor, not an advocate for the board, and that attorney-client privilege simply did not apply to the invoices. The supreme court disagreed. The court initially explained that the Alaska Public Records Act gives the public the right to inspect public documents unless required to be kept confidential by federal or state law, including by the common-law. The court noted that it had previously held that the deliberative process privilege was such a common-law exception, and

³ 426 P.3d 890 (Alaska 2018).

⁴ 428 P.3d 180 (Alaska 2018).

it reasoned that the long history and public interest behind the attorney-client and work-product privileges required recognizing them as such too. The court then determined that the deliberative process privilege applied to the communications, because they “occurred before the decision was issued and contain[ed] give-and-take on the wording of the decision.” It explained that compelling the disclosure of these materials would chill the deliberative process, undermining public trust and dissuading frank discussion amongst city staff. As for the invoices, the supreme court refrained from ruling on the substance of the materials, but rather, identified a procedural error in the superior court’s determination of whether the materials were privileged under the attorney-client and work-product privileges. Affirming the privilege of the communications and remanding for reconsideration on the status of the invoices, the supreme court held that the attorney-client and work-product privileges are state law exceptions to the Public Records Act, and that communications between members of quasi-judicial bodies and their supporting staff are protected by deliberative process privilege.

Nicolos v. N. Slope Borough

In *Nicolos v. N. Slope Borough*,⁵ the supreme court held that an administrative agency’s decision regarding a state employee’s discharge is independently reviewed by the supreme court; deference is given to the agency’s factual findings, but questions of law outside the agency’s special expertise are subject to a “substitution of judgment standard.” Tom Donovan Nicolos worked for the North Slope Borough Department of Public Works (the Borough) when he began having thoughts of harming himself and others which he characterized as “unwelcome.” After informing his supervisor of his thoughts, Nicolos was put on leave and eventually the Borough terminated him. Nicolos appealed to the Borough Personnel Board, which concluded there was just cause for discharge. Nicolos then appealed to the superior court, which reversed the Board’s findings in part, but ultimately affirmed the termination. Applying an “independent review” standard, the supreme court affirmed the Borough Personnel Board’s decision. The court explained that this standard applies to appeals from administrative agency decisions. It elaborated that under it, while no deference is shown to superior court rulings, three different standards of review apply to agency conclusions depending on the context. The court said that first agency’s findings of fact are accepted when supported by “substantial evidence,” and defined this as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Second, the court explained that questions of law involving “agency expertise or the determination of fundamental policies within the scope of the agency’s statutory functions”, are subject to a “reasonable basis test.” Finally, the court added that an agency interpretation of law beyond its special area of expertise is shown no deference under the “substitution of judgment standard.” Applying the substitution of judgment standard, the court found that an employee may be punished under the Borough’s personnel rule against threats when a reasonable person could interpret the employee’s actions as conveying intent to cause physical harm. Under this interpretation, and accepting the Board’s factual findings as true, the court concluded the Board’s finding that Nicolos’s statements were punishable threats was supported by substantial evidence. Affirming the Board on all issues, the supreme court held that an administrative agency’s decision regarding a state employee’s discharge is independently reviewed by the supreme court; deference is given to the agency’s factual findings, but questions of law outside the agency’s special expertise are subject to a “substitution of judgment standard.

⁵ 424 P.3d 318 (Alaska 2018).

Odom v. State Division of Corporations

In *Odom v. State Division of Corporations*,⁶ the supreme court held that a Medical Board's decision to impose sanctions must be supported by sufficiently substantial evidence that the doctor's actions demonstrated professional incompetence. Odom was accused of providing substandard care to his patient by administering excessive thyroid hormone treatment and by proscribing phentermine to a patient with cardiomyopathy (a heart condition). An administrative law judge held an evidentiary hearing and concluded that no disciplinary sanction was warranted because the Licensing Division had failed to prove that Odom's actions fell below the standard of care. However, the Medical Board voted unanimously to reject the administrative judge's decision and revoke Odom's Alaska medical license. Odom appealed and the superior court vacated the decision and remanded the matter to the Board to consider Odom's late-filed opposition that it had initially failed to consider. The Board reaffirmed its decision and the superior court affirmed the Board's decision. Odom appealed, claiming that the Medical Board lacked substantial evidence to support its decision. The supreme court held that the Board must prove by sufficient evidence, assuming a preponderance standard applied, that the doctor demonstrated professional incompetence by lacking the sufficient knowledge, skills, or professional judgment to a degree likely to endanger the health of the patient. Further, the court noted the legislature expressly warned against basing a finding of professional incompetence solely on a doctor's unconventional or experimental practices in the absence of demonstrable physical harm to the patient. Reversing the superior court's decision, the supreme court held that a Medical Board's decision to sanction must be sufficiently supported by substantial evidence that the doctor's actions demonstrated professional incompetence.

Pease-Madore v. State Dep't of Corrections

In *Pease-Madore v. Alaska Dep't of Corrections*,⁷ the supreme court held that a prisoner's procedural due process rights in a disciplinary hearing are satisfied by the use of incident reports as evidence and audio recordings as documentation of that hearing. Pease-Madore was disciplined for making threats of bodily harm and creating a disturbance; the superior court affirmed these disciplinary actions. Pease-Madore filed three appeals arguing that the Alaska Constitution's due process requirement for a "verbatim record of the [disciplinary] proceedings" from *McGinnis v. Stevens*,⁸ was in addition to, rather than in place of, the requirements of *Wolff v. McDonnell*.⁹ In *Wolff*, the United States Supreme Court held federal procedural due process in prisoner disciplinary hearings requires "a written statement by the factfinders as to the evidence relied on and the reasons" for disciplinary action.¹⁰ Pease-Madore argued that a verbatim record alone, as required by *McGinnis*, failed to satisfy *Wolff*. The supreme court disagreed, reasoning that the *McGinnis* standard is "a more protective requirement that can satisfy the written statement requirement." The court elaborated that if the recording includes information about the evidence relied upon in the disciplinary action, and the reasons for how a decision was reached, then a verbatim record better fulfills the goals served by requiring a written statement. Finally, the supreme court also held that an incident report can serve as part of the evidentiary basis for a prison

⁶ 421 P.3d 1 (Alaska 2018).

⁷ 414 P.3d 671 (Alaska 2018).

⁸ 570 P.2d 735 (Alaska 1977).

⁹ 418 U.S. 539 (1974).

¹⁰ 414 P.3d at 673.

disciplinary decision. According to 22 AAC 05.455(a), if a prisoner does not request the presence of the facility staff member who wrote the disciplinary record, the report may be used as evidence by the disciplinary tribunal to make a decision. The supreme court explained that in cases such as this one, where the staff member is present, nothing precludes the report from being considered as evidence. Ultimately, the Supreme Court of Alaska affirmed the superior court's ruling that audio recordings of disciplinary hearings as required under *McGinnis* satisfy the procedural due process requirement for a written record, and that a prisoner's incident reports can serve as the basis of a disciplinary decision even if the staff member who wrote that report is present.

BUSINESS LAW

Cox v. Estate of Cooper

In *Cox v. Estate of Cooper*,¹¹ the supreme court held that Alaska's usury statute¹² does not limit the maximum interest rate parties may specify on loans with a principal amount greater than \$25,000.¹³ The Coopers loaned Cox \$325,000 at an interest rate of 20% to be paid back in six months. Seven years later, after extensions and an interest rate reduction to 8%, the loan trustee gave notice of default and began foreclosure proceedings on Cox's home which had been put up as collateral. At the time Cox still owed \$315,500 in principal and nearly \$145,000 in accrued interest, roughly \$98,000 of which stemmed from the original 20% interest rate. Cox filed a complaint, arguing that subsection (a) of the usury statute, which sets the "state interest rate" of loans at 10.5%, applies to all loans that do not fall under subsection (b). He noted that subsection (b) does not apply to loans with a principal amount in excess of \$25,000 and so concluded that the Coopers' 20% interest rate violated the usury statute. On rehearing the superior court disagreed, finding that the legislative history indicated that the 10.5% state interest rate only applied when parties had not specified a rate on their own. The supreme court affirmed. It reasoned that the simplest reading of the statute indicates that subsection (b) governs all loans with express interest rates. The court noted that its own precedents had assumed as much, and after a thorough review of the legislative history it concluded that the legislative history supported this result as well. Applying this interpretation, the court concluded that subsection (b) of the usury statute governed the loan to Cox as it contained an express interest rate, and that therefore there was no statutory limit on the permissible interest rate as the principal amount exceeded \$25,000. Affirming the superior court's conclusion that the loan did not violate the usury law, the supreme court held that Alaska's usury statute does not limit the maximum interest rate parties may specify on loans with a principal amount greater than \$25,000.

Hooks v. Alaska United States Federal Credit Union

In *Hooks v. Alaska United States Federal Credit Union*¹⁴, the Supreme Court of Alaska affirmed the superior court's ruling that discredited both the "vapor money" and "unlawful money" theories as attempts to nullify a mortgage agreement. Hooks obtained a loan from Homestate Mortgage Company LLC (Homestate) to refinance an existing loan, which was secured by his property and a promissory note. Homestate then sold the promissory note and the beneficial interest in the deed to Alaska USA Federal Credit Union (Alaska USA). In 2015, Hooks defaulted on the loan and Alaska USA referred the defaulted loan and deed of the trust for foreclosure through Alaska's statutory nonjudicial deed of trust foreclosure process, resulting in its sale to Dennis Albert. Hooks sued, contending that his property could not be foreclosed on because the National Bank Act did not authorize Homestate to lend credit meaning issuing the loan was beyond its power. Hooks also claimed that the promissory note he gave was the equivalent of money that was created by his signature. As a result, Hooks argued that by giving the bank a promissory note in exchange for credit, he was defrauded into giving something of value to the bank for something which is worthless, in violation of the National Bank Act. The Supreme Court of Alaska rejected these

¹¹ 426 P.3d 1032 (Alaska 2018).

¹² Alaska Stat. § 45.45.010 (2016).

¹³ 426 P.3d at 1041.

¹⁴ 413 P.3d 1192 (Alaska 2018)

arguments and stated, “the vapor money and unlawful money theories have been repeatedly rejected by every court to consider the issue.” The Court held that the transfer of money to a third party, or what Hooks describes as mere “credit” can serve as a valid basis for an enforceable loan. Lastly, the Supreme Court of Alaska dismissed Hooks’ claim that the deed was invalid and stated conveyances of interests of land and deeds of trust do not have to be signed by the lender in order to be valid. Ultimately, the Supreme Court of Alaska affirmed the superior court’s ruling that the “vapor money” and “unlawful money” theories are not legitimate arguments to negate a loan, and a deed does not need to be signed by the lender in order to be a valid conveyance.

Pederson v. Arctic Slope Reg’l Corp.

In *Pederson v. Arctic Slope Reg’l Corp.*,¹⁵ the supreme court held that Alaska law permits corporations to unilaterally demand a reasonable confidentiality agreement when shareholders request copies of the shareholder list. Pederson requested a shareholder list from Arctic Slope Reg’l Corp. (ASRC). ASRC agreed under the condition that Pederson sign a confidentiality agreement, but after obtaining the list Pederson refused to comply with the agreement or to return the list stating that the agreement was unenforceable. ASRC brought suit against Pederson for breach of contract, seeking injunctive relief for the return of its confidential information and a declaratory judgment permitting ASRC to withhold confidential information from Pederson for two years. The trial court ruled in favor of ASRC and Pederson appealed, claiming that the confidentiality agreement was unenforceable as a matter of law because the information was not confidential. The supreme court recognized that section 10.06.413 of the Alaska Statutes requires corporations to provide a shareholder list for shareholder inspection at corporate offices twenty days before shareholder meetings, but it does not require providing shareholders with their own copies of the list. Therefore, the supreme court reasoned that shareholders seeking personal copies of the list must submit their requests under section 10.06.430 of the Alaska Statutes, which permits a corporation to request a confidentiality agreement “as a prerequisite to distributing otherwise-inspectable documents.” Vacating the superior court’s declaratory judgments as moot but otherwise affirming the decision, the court held Alaska law permits corporations to unilaterally demand a reasonable confidentiality agreement when shareholders request copies of the shareholder list.

¹⁵ 421 P.3d 58 (Alaska 2018).

CIVIL PROCEDURE

Brooks Range Petroleum Corp. v. Shearer

In *Brooks Range Petroleum Corp. v. Shearer*,¹⁶ the supreme court held that the proper venue for tort claims is where the harmful force of the tort first took effect, and that proper venue for contract claims is where a substantial part of the events giving rise to the claim occurred. While weighing a full-time employment offer from British Petroleum, Shearer was covering as a drilling consultant for the Brooks Range Petroleum Corp. (“BRPC”) near Nuiqsut in the Second Judicial District. A BRPC executive approached him with an employment offer, verbally guaranteeing ten years of job security. The contract was signed in Anchorage in the Third Judicial District, where Shearer performed most of his work. When he was terminated three-and-a-half years later, Shearer sued BRPC for breach of contract and tort claims, serving the complaint in the Third Judicial District in Anchorage but filing the suit in the Second Judicial District. Denying BRPC’s motion to dismiss for improper venue or alternatively to transfer venue to Anchorage, the lower court found that Shearer’s contract claims arose in Anchorage, but his tort claims arose in the Second Judicial District, and that public concerns of the local community near Nuiqsut weighed in favor of maintaining venue in the Second district. The supreme court reversed the lower court, reasoning first that the tort claims actually arose in the Third Judicial District because the “harmful force” of the alleged misrepresentation happened when Shearer was terminated in Anchorage. The court further explained that the Second Judicial District was not a proper venue for the breach of contract claim, because contract claims “arise[] where a substantial part of the events giving rise to the claim occurred” and no part of the alleged breach occurred in the Second Judicial District. Reversing and remanding for a transfer of venue to the Third Judicial District, the supreme court held that the proper venue for tort claims is where the harmful force of the tort first took effect, and that proper venue for contract claims is where a substantial part of the events giving rise to the claim occurred.

City of Kodiak v. Kodiak Public Broadcasting Corp.

In *City of Kodiak v. Kodiak Public Broadcasting Corp.*,¹⁷ the Supreme Court of Alaska held that courts may not award full attorneys’ fees under section 09.60.0101 of the Alaska Statutes unless a claimant raises a constitutional issue in their complaint or similar claim for relief. In September 2015, the Kodiak Police Department reportedly used excessive force in detaining an autistic suspect. Following the incident, radio station Kodiak Public Broadcasting Corporation (KMXT) requested the release of relevant public records pursuant to the Alaska Public Records Act. When the City refused, KMXT filed a complaint seeking to compel the disclosure of a list of withheld records, three chest camera videos, and all records that were not exempt. On December 22, the superior court ordered the immediate release of the three camera chest videos, prompting the City to release all relevant public records. KMXT subsequently sought full attorneys’ fees pursuant to section 09.60.0101 of the Alaska Statutes arguing that it had asserted a constitutional claim when seeking public records because Alaska courts had “characterized a citizen’s access to public records as a fundamental [constitutional] right.” The superior court apparently agreed, issuing a declaratory judgment for KMXT and granting the station’s request without explanation. On appeal, the supreme court determined that KMXT had “prevailed entirely on statutory grounds.” The court

¹⁶ 425 P.3d 65 (Alaska 2018).

¹⁷ 426 P.3d 1089 (Alaska 2018).

noted that KMXT had not explicitly raised constitutional issues until its motion for attorneys' fees. Reasoning from precedent, the court explained that for a claimant to assert a constitutional right under section 09.60.010 of the Alaska Statutes, they must raise that right in the complaint or similar claim for relief. As the superior court had never even been asked to rule on whether the Alaska Public Record's Acts grant of a right to public records derives for the constitution, the court concluded that KMXT had failed to raise a constitutional complaint. Reversing and remanding for a calculation of partial attorneys' fees under Alaska Rule of Civil Procedure 82, the supreme court held that courts may not award full attorneys' fees under section 09.60.0101 of the Alaska Statutes unless a claimant raises a constitutional issue in their complaint or similar claim for relief.

Fink v. Anchorage

In *Fink v. Anchorage*,¹⁸ the Supreme Court of Alaska held that in directly reviewing a municipal assembly's decision to levy a special assessment, a court will defer to the Assembly's expertise and only reverse upon proof of fraud or arbitrariness. Decades after an earthquake destroyed the neighborhood of Turnagain Heights, lot owners petitioned the Municipality of Anchorage for utility projects to improve the neighborhood. The owners approved the Municipality's cost estimates, and the Assembly accordingly created three special assessment districts to raise the funds necessary for the improvements. The Municipality then consolidated the projects with an unrelated fourth project for "maximum cost and schedule efficiencies," ultimately shifting roughly \$1,000,000 in costs for the fourth project onto owners of properties in the special assessment districts. Benefits from this fourth project flowed to properties within the special assessment districts and to other properties beyond them. Fink and other owners filed an appeal in superior court arguing that they were improperly forced to bear disproportionate costs of the fourth project considering the wider dispersion of benefits. The superior court ruled that the Assembly needed to conduct an adjudicatory hearing on the matter, and following the hearing the Assembly affirmed its earlier allocation of the costs. Unsatisfied, the property owners renewed their appeal. In reviewing the Assembly's decision, the Supreme Court attached a deferential "presumption of correctness" to special assessments levied by an assembly. The court explained that overcoming such a presumption requires a showing the Assembly "acted fraudulently or arbitrarily in determining the assessment amounts." Affirming the judgment of the superior court, the supreme court held that a presumption of correctness attaches to special assessments of a municipal assembly, and that this can only be overcome by a showing of fraud or arbitrariness.

Gross v. Wilson

In *Gross v. Wilson*,¹⁹ the Supreme Court of Alaska held that a properly challenged erroneous judgment is not void unless the deciding court lacked subject matter jurisdiction or violated due process. In the final divorce agreement between Robert Gross and Dawn Wilson, Gross agreed to regularly pay Wilson half of the value of his monthly United States Coast Guard (USCG) retirement and disability pay. A little over a year later, Gross unilaterally reduced the monthly payments of \$888.22 by \$170, claiming his disability pay was indivisible under the Uniformed Services Former Spouses' Protection Act (USFSPA). Wilson moved to enforce the agreement and Gross countered with his own motion to set aside the agreement as it allegedly violated the USFSPA. The superior court granted Wilson's motion and denied Gross's on the theory that the

¹⁸ 424 P.3d 338 (Alaska 2018).

¹⁹ 424 P.3d 390 (Alaska 2018).

superior court was merely enforcing a contractual agreement to pay a set amount regardless of the source of the funds rather than impermissibly dividing military disability pay as marital property. Further the superior court found that Gross had no procedural basis for bringing his motion well past the one-year statute of limitations prescribed by Alaska Civil Rule 60(b). Gross appealed the superior court's ruling but made no mention of its finding on the Rule 60(b) issue. On appeal, the supreme court explained that a Rule 60(b) motion is the only way to get relief from a final judgment on a property division. It elaborated that such a motion must be based on one of six specified reasons, and that Gross could only be based his motion on Rule 60(b)(4), an argument that the judgment was void for violating USFSPA. Without deciding the issue, the court recognized that Gross had a potentially valid argument that the superior court's judgment was erroneous for violating USFSPA. However, the court refused to find the judgment void. The court explained that while an erroneous divorce decree is voidable if properly challenged, the judgment itself is not void unless the deciding court lacked subject matter jurisdiction or violated due process. Finding that Gross had alleged neither defect, the supreme court affirmed holding that a properly challenged erroneous judgment is not void unless the deciding court lacked subject matter jurisdiction or violated due process.

Lum v. Koles

In *Lum v. Koles*,²⁰ the Supreme Court of Alaska held that in opposing a motion for summary judgment, a plaintiff may overcome the defense of qualified immunity, under section 09.65.070(d)(2) of the Alaska Statutes, when the record contains at least some objective evidence capable of supporting an inference of malice. Qualified immunity grants municipal employees immunity from a suit for damages when performing a discretionary function in good faith. Daniel Lum, a resident of North Slope Borough, had accused police officers of corruption, and had multiple altercations with Officer Grimes in particular. On September 18, 2007, Grimes and a fellow officer, Gutierrez, were dispatched to the Lums' home to complete a welfare check when a neighbor reported a domestic dispute. The officers claimed they heard shouting in the residence but their audio-tapes did not pick this up and the Lums disputed this claim. When Grimes and Gutierrez knocked on the door, the Lums' children allowed them in and were apparently not distressed. Neither officer identified themselves or their purpose for entering. They eventually discovered the Lums, with their baby, arguing in the bathroom. A dispute between the officers and Daniel culminated with Grimes pepper-spraying and cuffing Daniel, some of the spray hit Daniel's wife Polly and their infant. The Lums sued for invasion of privacy and trespass. The superior court dismissed both claims on summary judgment, reasoning that the officers were protected by qualified immunity; the Lums appealed. The Supreme Court of Alaska disagreed. It explained that qualified immunity only protects officers acting in good faith; therefore, a plaintiff can overcome it by showing officers acted corruptly, maliciously, or in bad faith. The court continued that because summary judgment is not granted unless no genuine issue of material fact exists, and because the record is taken in the best light for the non-movant, demonstrating malice is a low bar at that stage of proceedings. The court concluded that the Lums met this bar as a jury could reasonably find the officers had entered the residence in bad faith without an actual belief that an emergency existed. Reversing the superior court's decision, the court held that in opposing a motion for summary judgment, a plaintiff may overcome the defense of qualified immunity when the record contains at least some objective evidence capable of supporting an inference of malice.

²⁰ 426 P. 3d 1103 (Alaska 2018).

Olivera v. Rude-Olivera

In *Olivera v. Rude-Olivera*,²¹ the Supreme Court of Alaska held that (1) “a party who fails to make required pretrial disclosures ‘without substantial justification’ may not . . . use that information as evidence at trial, ‘unless such failure is harmless,’” and (2) a party is entitled to recover enhanced attorney’s fees if the other party has acted in bad faith throughout the case. Ronalda Rude-Olivera was the primary breadwinner during her marriage to Anthony Olivera. The couple sold their home in Alaska to move to California for Anthony’s supposed cancer treatment, with Ronalda occasionally returning to Alaska for work. However, after convincing Ronalda to quitclaim her interest in the property to him in order to avoid foreclosure, Anthony then had his girlfriend take over payments for the property. During the divorce proceedings, Anthony repeatedly delayed the trial and attempted to damage Ronalda’s reputation at work. Though Anthony sought a missing tax return from his ex-wife, the supreme court determined that it was not essential to the case and that Ronalda had thus complied with the discovery requirements. In awarding enhanced attorney’s fees, the lower court first noted that it would not have ordinarily awarded such fees in the “absence of vexatious conduct” given her stronger financial position. However, it then found that Anthony’s conduct throughout the proceeding exhibited bad faith and awarded a “modest” fee. The Supreme Court affirmed concluding the lower court had followed the required process to award enhanced attorney’s fees. Accordingly, it held that a harmless failure to disclose information is excusable, and enhanced attorney’s fees may be awarded if the other party has acted in bad faith.

Strong v. Williams

In *Strong v. Williams*,²² the supreme court held that despite pre-trial dismissal with prejudice of a landowner’s settled claims against his neighbors, res judicata and collateral estoppel do not preclude subsequent claims against a municipality on the same underlying facts. Since 1974, John Strong has owned property in Anchorage; since the 1980s, the property has experienced significant flooding as a result of a neighbor’s access road, which the Municipality was made aware of in 1993. In 2010, Strong sued James and Suzie Williams, two neighbors, for trespass and nuisance and sought a court order to abate the flooding. He ultimately released the claims in exchange for compensation and a promise to upgrade the road, filing a stipulation in July 2012 dismissing all claims with prejudice. In 2015, Strong filed another suit, this time including the Municipality of Anchorage, seeking compensatory damages and the removal of the road. The superior court granted a subsequent motion to dismiss by the Municipality on the basis of collateral estoppel and res judicata. The supreme court held that neither res judicata nor collateral estoppel applied because the Municipality was not in privity to the original suit and the issues at hand were not actually litigated prior to the settlement. The court explained that in order to trigger res judicata, there must be (1) a final judgment on the merits, (2) from a court of competent jurisdiction, (3) in a dispute between the same parties about the same cause of action. It found that the third prong was not satisfied. The court continued explaining that in order to trigger collateral estoppel, the issue must have previously been actually litigated and determined by a valid and final judgment. The court found that this requirement had not been met as settlement of the prior claims prevented actual litigation from occurring, and the stipulation did not explicitly preclude other litigation. Reversing, the supreme court held that despite pre-trial dismissal with prejudice of a landowner’s

²¹ 411 P.3d 587 (Alaska 2018).

²² No. S-16730, 2018 WL 6582299 (Alaska Dec. 14, 2018).

settled claims against his neighbors, res judicata and collateral estoppel do not preclude subsequent claims against a municipality on the same underlying facts.

Toni I Trust, by Tangwall v. Wacker

In *Toni I Trust, by Tangwall v. Wacker*,²³ the supreme court held that section 34.40.110(k) of the Alaska Statutes cannot deprive either federal or other states' courts of jurisdiction over fraudulent transfer actions. In 2007, a Montana court issued multiple default judgments against Tangwall and his family, leading them to transfer property to a trust created under Alaska law. Bertran Tangwall subsequently filed for bankruptcy in Alaska which placed her interest in the trust under a federal bankruptcy court. Fraudulent transfer actions were successfully brought against the Tangwalls in both a Montana court and in federal bankruptcy court. Tangwall then filed a complaint in Alaska state court, arguing that section 34.40.110(k) of the Alaska Statutes provides Alaska courts with exclusive jurisdiction regarding such fraudulent transfer actions making the judgments against the Tangwall's void. Citing *Tennessee Coal, Iron & Railroad Co. v. George*,²⁴ the supreme court found unconvincing the argument that the Full Faith and Credit Clause compels states to follow another state's law asserting exclusive jurisdiction, regardless of whether the other state's law created the cause of action.²⁵ Citing *Marshall v. Marshall*,²⁶ the supreme court held that a state court cannot limit federal jurisdiction even when the issue arises under that state's law.²⁷ Furthermore, if this was not the case, the supreme court found it likely that the Supremacy Clause would prevent section 34.40.110 of the Alaska Statutes from restricting the federal bankruptcy court's jurisdiction. Therefore, the supreme court affirmed the superior court's judgment dismissing Tangwall's complaint, holding that 34.40.110 of the Alaska Statutes cannot provide exclusive jurisdiction to Alaska state courts over fraudulent transfer actions.

Whalen v. Whalen

In *Whalen v. Whalen*,²⁸ the supreme court held that to obtain a new long-term domestic violence protective order a person must allege a new violent incident that has not previously served as the basis for such a protective order, using incidents that served as the basis for a prior order would violate res judicata. Sarah Whalen had received multiple domestic violence protective orders against her husband Sean Whalen. Sarah petitioned to extend an existing protective order, but the superior court denied, explaining that Sarah would have to file for a new protective order. Sarah petitioned for a new protective order, but the superior court again denied, explaining that Sarah could not use incidents of domestic violence that served as the basis of her previous order to obtain a new one. The supreme court affirmed the ruling of the superior court, reasoning that res judicata extinguishes previous claims of domestic violence for which a domestic violence protective order has already been granted. It explained that while domestic violence is cyclical the statutory scheme requires a new incident to justify a new order. Affirming the lower court's opinion, the supreme court held that to obtain a new long-term domestic violence protective order a person must allege

²³ 413 P.3d 1199 (Alaska 2018).

²⁴ 233 U.S. 354 (1914).

²⁵ 413 P.3d at 1203–04.

²⁶ 547 U.S. 293 (2006).

²⁷ 413 P.3d at 1206.

²⁸ 425 P.3d 150 (Alaska 2018).

a new violent incident that has not previously served as the basis for such a protective order, using incidents that served as the basis for a prior order would violate res judicata.

CONSTITUTIONAL LAW

Graham v. Durr

In *Graham v. Durr*,²⁹ the Alaska Supreme Court held that a defendant may, in a civil proceeding, assert his right against self-incrimination while the defendant's direct appeal of his sentence is pending. In August 2013, Stacey Graham struck and killed two pedestrians while driving under the influence. In May 2014, the victims' families filed suit against Graham. In February 2015, Graham plead guilty and was sentenced to 32 years imprisonment. One month later, Graham appealed his sentence, not his conviction, and around the same time he was served with a number of discovery requests in connection with the civil lawsuit. Graham refused to answer some of the questions in these requests (and questions in similar requests from his former employer a year later), asserting his Fifth Amendment privilege against self-incrimination. Graham's former employer and the victims' families moved to compel Graham to respond to these discovery requests and to prevent Graham from asserting his privilege. They argued that the privilege only applies when there is a risk that one's testimony could increase criminal penalties and that because Alaska does not allow sentences imposed during resentencing to exceed the original sentence, Graham could not assert the privilege. The superior court granted this motion to compel. On appeal, the supreme court reversed. It explained the standard for whether a defendant can assert the privilege against self-incrimination is whether the testimony "could expose him to a real and substantial hazard of incrimination." The court reasoned that though Graham could not face a "greater punishment," than his initial sentence, he could still face adverse consequences if compelled to testify thereby facing "greater punishment" than "*if he were permitted to invoke the privilege.*" Reversing and remanding, the court held that defendants can assert their privilege against self-incrimination in a civil proceeding on the basis of a pending appeal of a criminal sentence.

Huber v. State Dep't of Corrections

In *Huber v. State Dep't of Corrections*,³⁰ the supreme court held that, with the possible exception of very simple cases, a hearing officer in a prison disciplinary proceeding must include the basis for their decision in writing or through a recording in order to satisfy due process. Huber was an inmate at the Goose Creek Correctional Center who was cited for a disciplinary violation. A hearing officer subsequently found him guilty without stating any reasoning. The superior court upheld the hearing officer's decision, finding that Huber had waived his due process argument by failing to raise it in the prison appeal process, and finding that Huber failed to show he had been prejudiced by the lack of written findings. On appeal, the supreme court reversed, first determining that Huber did forfeit his due process claim by failing to raise it because he was not advised that failing to raise it could result in forfeiture and he lacked legal help in filing his appeal. The court further reasoned that because the hearing officer's written decision and the recording of the hearing included no reasoning supporting the finding of guilt, it was impossible for a reviewing body to

²⁹ 433 P.3d 1098 (Alaska 2018).

³⁰ 426 P.3d 969 (Alaska 2018).

properly review the decision. The court noted that review may be possible without a statement of reasoning in a very simple case when there is both no room to debate the basis for an officer's finding of guilt, and the officer's reasoning can be reliably inferred. The court concluded this was not such a case. Reversing the superior court's decision, the supreme court held that, with the possible exception of very simple cases, a hearing officer in a prison disciplinary proceeding must include the basis for their decision in writing or through a recording in order to satisfy due process.³¹

Kowalski v. State

In *Kowalski v. State*,³² the court of appeals held that retroactive application of Alaska Evidence Rule 404(b)(4) did not violate the ex post facto clauses of the Alaska Constitution or the United States Constitution. In 1996, investigators declined to charge Kowalski for the death of his girlfriend Perry, whom by his account he accidentally shot and killed with a shotgun while traveling in Alaska. In 2008, Kowalski shot and killed his girlfriend Morin in Montana. Although Kowalski claimed that Morin's death was accidental, he later pleaded no contest to mitigated deliberate homicide. After the Montana shooting, Alaska reopened the investigation of Perry's 1996 death, and Kowalski was indicted and convicted of second-degree murder. At trial the state presented evidence of the Montana shooting pursuant to Alaska Rule of Evidence 404(b)(4) which makes evidence of other crime of domestic violence admissible in the prosecution of a crime of domestic violence. On appeal, Kowalski argued that retroactively applying Rule 404(b)(4), which was enacted one year after Perry's death in 1997, violated the ex post facto clauses of the Alaska and United States constitutions. The court of appeals affirmed the lower court's decision, reasoning that the clauses do not apply to Rule 404(b)(4) as it is an ordinary rule of evidence which only governs admissibility. The court distinguished Rule 404(b)(4) from rules of evidence that alter the type or quantum of evidence legally required, contrasting it with the Texas statute the United States Supreme Court refused to apply retroactively in *Carmell v. Texas*.³³ Affirming the lower court's decision, the court of appeals held that retroactive application of Alaska Evidence Rule 404(b)(4) did not violate the ex post facto clauses of either the Alaska Constitution or the United States Constitution.³⁴

Simmons v. State Dep't of Corrections

In *Simmons v. State Dep't of Corrections*,³⁵ the Supreme Court of Alaska held that though AS 11.56.760 has a retroactive requirement that persons convicted of certain crimes provide a DNA sample, it is not an ex post facto law under the Constitution of Alaska. David Simmons was found guilty of four felonies in September of 1995. As part of his mandatory parole in February 2014, he was asked to provide a DNA sample, he refused. The Department of Corrections subsequently found him guilty of violating AS 11.56.760, which makes it a class C felony for people convicted of certain crimes to refuse to provide a DNA sample to an officer upon request. AS 11.56.760 went into effect on January 1, 1996, and in 2003 its requirements were made retroactively applicable to all convictions "that occurred before July 1, 2003 if the person was incarcerated or

³¹ *Id.* at 973–74.

³² 426 P.3d 1148 (Alaska Ct. App. 2018).

³³ 529 U.S. 513.

³⁴ *Kowalski*, 426 P.3d. at 1153–54.

³⁵ 426 P. 3d 1011 (Alaska 2018).

was under supervised probation or parole for the offenses on or after July 1, 2003.” Acknowledging that the law applied to him, Simmons appealed, ultimately arguing to the supreme court that the retroactive application of AS 11.56.760 as applied to him violated Alaska’s ex post facto clause because he was convicted in 1995 before the law ever went into effect. The Supreme Court of Alaska held that the DNA sample requirement does not fit the definition of an ex post facto law: “any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with a crime of any defense available according to law at the time when the act was committed.” The court used the “intent-effects” test to determine whether the statute imposed a punishment, thereby violating the ex post facto clause of the Alaskan Constitution. Under this test, a court first determines if the legislature intended the law to act as a punishment. If yes then the law violates the clause, but if the answer is no, the court analyzes the effects of the statute according to seven factors to determine whether the statute serves an alternative purpose or if it violates the clause by effectively operating as a punitive measure.³⁶ After analyzing the seven factors the court concluded the DNA registry was not punitive. In particular, it noted the registry has a “valid regulatory purpose” to aid law enforcement in enhancing public safety, its requirements are less burdensome than the Alaska Sex Offender Registry Act (ASORA), and the means of collecting the DNA—a mouth swab—is minimally intrusive. Affirming the superior court, the supreme court held that though AS 11.56.760 has a retroactive requirement that persons convicted of certain crimes provide a DNA is retroactive, it is not an ex post facto law under the Constitution of Alaska.

Smith v. State

In *Smith v. State*,³⁷ the Alaska court of appeals held that to determine if two crimes constitute a single offense for double jeopardy purposes “a court must compare the different statutory provisions as applied to the facts of the case.” Smith, along with three other men broke into Benjamin Gall and Amanda Swafford’s apartment while they were sleeping, struck Gall in the face and head, and stole items from the apartment. Smith was tried with two others (the fourth was never captured) and found guilty of first-degree robbery, first-degree burglary, second-degree assault, and second-degree theft. At sentencing, the court merged the robbery and theft verdicts into a single conviction and rejected Smith’s proposed mitigating factor. Smith argued on appeal that under the double jeopardy clause of the Alaska Constitution,³⁸ he could not lawfully receive separate convictions for the first-degree robbery and the second-degree assault since the two constituted the “same offense.”³⁹ The court of appeals analyzed the elements of each statutory provision and held that although robbery requires the additional element of “intent to prevent or

³⁶ See *id.* at 1017 (explaining the seven factors as 1. “Whether the sanction involves an affirmative disability or restraint”; 2. “Whether it has historically been regarded as punishment”; 3. “Whether it comes into play only on a finding of scienter”; 4. “Whether its operation will promote the traditional aims of punishment—retribution and deterrence”; 5. “Whether the behavior to which it applies is already a crime”; 6. “Whether an alternative punishment to which it may be rationally connected is assignable for it”; and 7. “Whether it appears excessive in relation to the alternative purpose assigned.”).

³⁷ 426 P.3d 1162 (Alaska Ct. App. 2018).

³⁸ Alaska Const. art. I, § 9.

³⁹ 426 P.3d at 1164–65.

overcome resist[ance] to the taking or retention of property,” the differences between that and the assault charge “were not substantial enough to justify multiple convictions” since the threat of immediate harm from the robbery was the same threat of fear of imminent serious physical injury that constituted the assault. The Court also rejected the State’s contention that the jury’s separate special verdict indicated Smith was convicted for each crime on the basis of separate and distinct acts. The court of appeals remanded for merger of the judgments of first-degree robbery and second-degree assault, holding that Alaska’s double jeopardy clause did not permit separate convictions when the charges were based on the same underlying conduct as the elements of the two offenses are too similar.⁴⁰

Walker v. State Dep’t of Corrections

In *Walker v. State Dep’t of Corrections*,⁴¹ the supreme court held (1) a prisoner has a due process right to call witnesses in a disciplinary hearing and (2) a prisoner does not waive this right by failing to raise it during the administrative appeals process. In October 2013, Walker, an inmate, began work developing an outline of topics he thought would be helpful for new inmates. In August 2014, Baumgartner, a department of corrections (DOC) employee, met and discovered that though Walker was being paid, he had not worked since November 2013. According to Baumgartner, Walker claimed he informed four staff members of the mistake, though he could only name two, and he had sent a “Request for Interview Form” to contact officers. Soon after this meeting, Baumgartner conducted an investigation and found none of Walker’s claims to be true. Based on this, the DOC charged Walker with “stealing government property” and providing “false statements” to a staff member.” Walker requested three witnesses at his hearing, but the presiding officer denied this request and found Walker guilty, ordering restitution of \$316. Walker appealed to the superintendent, but his appeal was denied. Walker then appealed to the superior court presenting an additional claim that the DOC violated his due process rights by not allowing him to call witnesses in his defense. The superior court denied Walker’s appeal, determining that “some evidence” supported the guilty finding and that Walker waived his right to assert a due process violation when he failed to raise it in his administrative appeal to the superintendent. The supreme court reversed reasoning that prisoners often lack the time and expertise to effectively present and preserve constitutional claims as they have no right to legal assistance and limited resources in preparing their appeals. Further, it explained that Walker’s due process rights had been violated because while a hearing officer may decline to call witnesses, the officer must document reasons for this declination and this had not occurred. Reversing and remanding the matter for a new hearing, the supreme court held (1) a prisoner has a due process right to call witnesses in his defense for disciplinary hearings and (2) a prisoner does not waive his due process right to call witnesses by failing to raise it during the administrative appeals process.

⁴⁰ See *id.* at 1166. (noting that because Smith’s sentence for the assault was completely concurrent to his sentence for robbery, resentencing was not necessary).

⁴¹ 421 P.3d 74 (Alaska 2018).

CRIMINAL LAW

Ladick v. State

In *Ladick v. State*,⁴² the court of appeals held that when the government prosecutes defendants for breath-test refusal it must prove a causal connection between the arrest and the act of driving or operating a motor vehicle. After a state trooper discovered Ladick intoxicated while sitting in a parked car in a power line easement, Ladick was charged with DUI and breath-test refusal. Ladick testified that he had arrived at the easement approximately three hours before the trooper arrived, drank a six-pack, then did not drink for about two and a half hours. A jury found Ladick guilty of breath test refusal, but acquitted him of the DUI charge. On appeal, Ladick argued that the trial judge improperly prevented him from arguing that his act of driving was too remote from his arrest. The court of appeals disagreed, reasoning that the relevant inquiry should be on whether Ladick was driving or operating a motor vehicle during the incident which gave rise to his arrest, not on how much time had elapsed since that incident. The court further explained that regardless of when Ladick arrived at the scene, if there was probable cause to find that he was intoxicated while driving to the scene or while maintaining control of the vehicle at the scene, he had a duty to take a breath test. Affirming the lower court's decision, the court of appeals held that when the government prosecutes defendants for breath-test refusal, the government must prove a causal connection between the arrest and the act of driving or operating.

Luch v. State

In *Luch v. State*,⁴³ the court of appeals held that a married person is not entitled to a heat of passion defense based on the discovery of adultery unless the married person has personal knowledge of such adultery. In 2010, Luch overheard his wife, Jocelyn, talking with another man on the telephone. This began a period of great tension in their marriage. A couple months later, after Luch was unable to locate Jocelyn at a race, Luch shot and killed Jocelyn in their home during an altercation in which Luch had accused Jocelyn of seeing another man. On appeal, Luch argued that the trial judge erred in refusing to give a jury instruction on the heat of passion defense. The court of appeals affirmed the trial judge's decision, reasoning that Luch was not subjected to serious provocation as required under the statute. The court explained that discovering one's spouse in the very act of adultery was sufficient to constitute serious provocation at common law. However, the court explained that discovery must be based on personal knowledge because Alaska's statutory definition of serious provocation disqualifies hearsay reports or mere suspicions. There was no evidence that Luch had personal knowledge or even a reasonable belief that Jocelyn was having an affair. Affirming the judgement of the lower court, the court of appeals held that a married person is not entitled to a heat of passion defense based on the discovery of adultery unless the married person has personal knowledge of such adultery.

Patterson v. Walker

In *Patterson v. Walker*,⁴⁴ the supreme court held that prisoners may not use a civil suit for damages to attack the validity of their criminal convictions or sentences. After trial, Patterson was convicted of seven counts of possession of child pornography. Two years later, Patterson filed a 121-page

⁴² 421 P.3d 142 (Alaska Ct. App. 2018).

⁴³ 413 P.3d 1224 (Alaska Ct. App. 2018).

⁴⁴ 429 P.3d 829 (Alaska 2018).

civil complaint alleging that various state actors had directly harmed Patterson and had violated his Constitutional Rights. The superior court approved the State’s motion to dismiss, concluding that Patterson had failed to state a claim upon which relief could be granted. The supreme court affirmed the ruling of the superior court on different grounds, holding that a judgment in favor of Patterson would imply the invalidity of his conviction or sentence. The court reasoned that allowing civil actions that would necessarily invalidate the plaintiff’s criminal convictions would create the potential for two resolutions emerging from the same incident. It concluded that because of this danger, and the fact that civil suits are a poor vehicle for challenging the validity of a criminal conviction or sentence, such suits should only be allowed after the conviction or sentence has been set aside in a criminal proceeding. In affirming the superior court, the supreme court held that prisoners may not use a civil suit for damages to attack the validity of their criminal convictions or sentences.

Pfister v. State

In *Pfister v. State*,⁴⁵ the Alaska Court of Appeals held that a surviving felony accomplice may be prosecuted for manslaughter when a fellow accomplice is killed by the victim or responding police officers. Brian Albert Pfister and two accomplices broke into the home of a marijuana grower and robbed him. Pfister waited outside while his accomplices entered the home and demanded the grower’s money. The grower led the accomplices to a safe where he had a hidden handgun; he used it to shoot and kill both accomplices. Pfister ran away but was later arrested and convicted of, *inter alia*, two counts of manslaughter for causing the deaths of his two accomplices. Based on Alaska’s restrictive definition of felony-murder, Pfister argued he could not be convicted of felony-murder. The court of appeals said that under Alaska’s felony-murder statute, “a person cannot be convicted of felony-murder based on the death of one of the other participants in the felony.” Analyzing the development of the felony-murder rule and misdemeanor manslaughter, the court concluded that manslaughter has traditionally been “a residual category of unlawful homicide,” encompassing any unlawful killing that does not constitute murder. Thus, the court explained that unlike felony-murder manslaughter makes up a much broader category of crime, but also requires proof of mens rea regarding the possibility that the defendant’s conduct could result in death. Accordingly, the Court of Appeals affirmed the lower court and held that a defendant could be prosecuted for manslaughter but not felony-murder for the death of an accomplice at the hands of the victim or the police.

State v. Doe

In *State v. Doe*,⁴⁶ the supreme court held individuals convicted out-of-state may only be required to register in Alaska as sex offenders if their conviction was under an out-of-state law “similar” to an Alaskan law. Two cases consolidated on appeal presented similar facts. In the first, John Doe I plead guilty to “communicating with a minor for immoral purposes” in violation of Washington law, and was required to register in Washington as a sex offender. When Doe I planned to travel to Alaska, he petitioned the Alaska DPS Offender Registry to see if he would have to register there. He was told that he would have to register in Alaska for life. The Alaska superior court granted him relief, which DPS appealed. John Doe II was convicted of “annoying or molesting a child under 18” in violation of California law and was sentenced to register as a sex offender there. Prior

⁴⁵ 425 P.3d 183 (Alaska Ct. App. 2018).

⁴⁶ 425 P.3d 115 (Alaska 2018).

to sentencing, Doe II moved to Alaska and did not register. Subsequently, DPS determined that Doe II's conviction resembled an Alaskan offense sufficiently so that he had to register as a sex offender. Doe II appealed to the superior court, which affirmed DPS's decision. Doe II appealed, and the two cases were joined. The supreme court said the Alaska Sex Offender Registration Act (ASORA) requires individuals convicted of sex offenses to register as a sex offender, and "sex offense" is defined to include convictions under "a similar law of another jurisdiction." The court explained that it determines whether a conviction was under a similar law by comparing the law's elements to the most comparable Alaskan sex offense, rather than comparing the underlying facts of the offense to the Alaskan statute. It elaborated that where an individual convicted under a more restrictive out-of-state statute could also be convicted under an Alaskan statute the laws are automatically considered similar. However, the court cautioned that just because an individual could not be convicted under an Alaskan statute does not mean the compared laws are dissimilar. The court broadly interpreted laws to be "similar" when their elements are only categorically alike; it clarified that the elements need not be identical or even substantially similar to qualify as "similar." Despite this low standard, the court found both the Washington and the California laws, while at a very general level like the relevant Alaska offenses, to be significantly different from and considerably broader than the purportedly "similar" Alaskan laws. Therefore, the supreme court affirmed the superior court in Doe I's case, and reversed and remanded the superior court's decision in Doe II's case, holding that individuals convicted out-of-state may only be required to register in Alaska as sex offenders if their conviction was under an out-of-state law "similar" to an Alaskan law.

CRIMINAL PROCEDURE

Anderson v. State

In *Anderson v. State*,⁴⁷ the court of appeals held that an intimate relationship between a minor and a high school music teacher indicted on sexual abuse constituted a crime of domestic violence, therefore qualifying for a statutory exception to spousal immunity from adverse testimony. A music teacher allegedly engaged in sexual relations on school grounds with a 15-year-old student for several months in 2014. Following grand jury indictment of the teacher for multiple counts of sexual assault, the State indicated that it intended to call the teacher's wife as a witness, specifically in regard to admissions the teacher made to her about his acts. The wife asserted spousal immunity under Alaska Evidence Rule 505(b). The state responded that Rule 505(b)'s exception for a crime of domestic violence applied to this case. The lower court ruled for the state, concluding that under section 18.66.990 of the Alaska Statutes, the relationship between the student and teacher made the student a household member, and so the crime was one of domestic violence. On appeal, the wife argued that domestic violence should be given its everyday meaning centered around a familial relationship, and that the student and her husband could not be in a recognized relationship because the student was not old enough to consent. The court of appeals affirmed the lower court's ruling. It reasoned that the statute's plain language evidenced an intent to define anyone dating, or engaged in a sexual relationship, to be a household member regardless of the legality of this relationship. The court explained that the legislature intended to broaden legal protection to victims. It noted however that this language did not create an "any child" exception to the privilege, and that only the legislature could broaden the exception to that degree. The court concluded that the sexual or romantic relationship between the student and teacher, made the student a household member, and so the sexual assault was a crime of domestic violence, and spousal privilege was inapplicable. Affirming the ruling of the lower court, the court of appeals held that an intimate relationship between a minor and a high school music teacher indicted on sexual abuse constituted a crime of domestic violence, which fell under exemptions to spousal immunity from adverse testimony.

Alvarez-Perdomo v. State

In *Alvarez-Perdomo v. State*,⁴⁸ the court of appeals held that defendants must clearly and unequivocally state their desire to testify before a judge directs them to take the stand. Alvarez-Perdomo was convicted of first-degree assault for shooting his mother. At trial, Alvarez-Perdomo's attorney announced that he did not intend to present a defense case, which triggered the judge's obligation to personally question Alvarez-Perdomo on his decision not to testify. After several attempts to clarify whether Alvarez-Perdomo wanted to testify, the judge pressed him and Alvarez-Perdomo said, "It seems so. I don't know. I am not a lawyer." The judge then directed Alvarez-Perdomo to take the stand and testify. Alvarez-Perdomo later appealed his conviction, arguing that the trial judge forced him to testify at trial, thus violating his constitutional right against self-incrimination. Accepting Alvarez-Perdomo's argument, the appellate court nonetheless affirmed. It explained that under the *Lavigne* rule, whenever the attorney representing a criminal defendant announces that the defense intends to rest without presenting the defendant's testimony, the trial judge must personally address the defendant to make sure the defendant

⁴⁷ No. A-12600, 2018 WL 6582628 (Alaska Ct. App. Dec. 14, 2018).

⁴⁸ 425 P.3d 221 (Alaska Ct. App. 2018).

understands that they have the right to testify, and that the decision whether to testify rests solely with the defendant, regardless of their defense attorney's advice or wishes. When a judge asks a defendant whether they wish to testify and the defendant offers only equivocal responses, a judge must order the trial to proceed without the defendant's testimony, rather than risk the prospect of forcing a defendant to testify. Because Alvarez-Perdomo did not clearly state his desire to testify, the trial judge committed constitutional error by coercing Alvarez-Perdomo to take the stand, but this error was harmless beyond a reasonable doubt due to the other evidence supporting his conviction. Thus, the court of appeals affirmed and held that defendants must clearly and unequivocally state their desire to testify before a judge directs them to take the stand.

Alaska Dep't of Public Safety v. Superior Court

In *Alaska Dep't of Public Safety v. Superior Court*,⁴⁹ the Court of Appeals held that state courts may not order transportation of a prisoner between facilities absent extraordinary circumstances. While the underlying criminal action against William Hoogendorn was pending, the lower court granted a motion requesting the Department of Corrections move Hoogendorn to a different facility for psychological evaluation. Upon reconsideration, the lower court determined the Department of Corrections was not responsible for transporting prisoners between facilities and instead directed the Department of Public Safety to move the prisoner. On appeal, the Court of Appeals determined that the lower court lacked statutory to direct transportation because (1) the first subsection at issue was inapplicable and (2) courts have "extremely limited" authority to interfere with the Departments' internal workings. The Court of Appeals reserved courts' authority to interfere for "extraordinary circumstances," which were absent in the case at hand. Circumstances that could qualify might include a threat to a defendant's physical safety or due process rights, but not merely an attempt to cut costs. Reversing the lower court's decision, the Court of Appeals held that courts may not exceed their authority by ordering transportation of prisoners.

Beier v. State

In *Beier v. State*⁵⁰, the court of appeals held that the Anchorage superior court's standing order, limiting the time for filing preemptory challenges, was unenforceable because it conflicted with the provisions of Criminal Rule 25(d) and does not fall within the Superior Court's authority under Criminal Rule 53. Beier was notified at a Tuesday trial call that Anchorage superior court Judge Kevin Saxby was assigned to preside over his case. Beier's attorney filed a preemptory challenge under Rule 25(d) the following Monday. However, the superior court ruled that Beier's attorney did not file his challenge in time according to a standing order of the Anchorage superior court, which required challenges to be filed within a day and a half. The State argued that the Anchorage standing order is lawful according to Alaska Criminal Rule 53, which gives the courts the authority to relax or dispense with criminal rules "in any case where it shall be manifest to the court that a strict adherence to them will work injustice." The State contended the standing order is governed by Rule 53 in order to promote court efficiency and prevent undue delay such as issues relating to witness availability. On appeal, the court held Criminal Rule 53 does not apply to this situation. The court reasoned that the Anchorage superior court's standing order is a rule of local practice, and is actually governed by Administrative Rule 46. However, Rule 46(b) precludes the standing

⁴⁹ 411 P.3d 648 (Alaska Ct. App. 2018).

⁵⁰ 413 P.3d 1245 (Alaska Ct. App. 2018)

order because no local order can be administered if it conflicts with the Alaskan statutes or the rules of the court. Ultimately, the court reversed the superior court's denial of Beier's peremptory challenge of Judge Saxby and should have followed Criminal Rule 25(d), which allows each party to file its preemptory challenge within five days. This case may be subject to correction if rehearing is sought and granted

Brown v. State

In *Brown v. State*,⁵¹ the supreme court held that a claim that appellate counsel had a conflict of interest, and a request to disqualify an appellate judge, should be raised as part of a post-conviction relief petition rather than in an immediate appeal to the supreme court. Brown petitioned the supreme court for a hearing after the court of appeals upheld Brown's convictions for sexual abuse of a minor and incest. The supreme court denied Brown's request and affirmed the decision of the court of appeals. The supreme court agreed with the state that Brown's claims could be incorporated into a post-conviction relief application, and reasoned that Brown's claims would be difficult to review without a trial court record. Affirming the lower court, the supreme court held that an assertion of conflict of interest against appellate counsel and a request for disqualification for a judge should be made as part of a post-conviction relief petition rather than as a hearing before the supreme court.

Cardenas v. State

In *Cardenas v. State*,⁵² the court of appeals held that the single-purpose container exception to the Fourth Amendment does not apply to gun cases if the incriminating nature of their contents is not immediately apparent. Jesus Cardenas was pulled over for reckless driving and, in the course of that traffic stop, informed the officer that he had a gun in a case on the backseat. The case was fully zipped closed and out of Jesus's reach. The officer took the gun case back to his car, where he searched through several of its small compartments and found cocaine before searching the primary compartment which contained Jesus's gun. This officer then called in backup and fully searched the vehicle, uncovering more cocaine and methamphetamines. Cardenas moved to suppress the evidence as the result of an unlawful seizure. The motion was denied, and he was convicted on several drug and weapons-related offenses. The court of appeals found that although the gun case may have been lawfully seized, neither officer safety nor the single-purpose container exception justified the officer's warrantless search of the container. The court agreed with the state that the United States Supreme Court's single-purpose container exceptions established that there is no reasonable expectation of privacy for containers whose contents can be inferred from their appearance, including gun cases. However, it interpreted the exception to only apply when the "incriminating nature of the container's contents is immediately apparent." The court explained that in this case there was nothing obviously unlawful about Cardenas's possession, so the fact that there was clearly a gun inside the case did not automatically waive his expectation of privacy in the case's contents. The court also noted that there was no officer safety justification to the search as any potential danger dissipated once the officer removed the case from Cardenas's car. Finding the search to be improper, the court of appeals reversed, holding that the single-purpose container exception to the Fourth Amendment does not apply to gun cases if the incriminating nature of their contents is not immediately apparent.

⁵¹ 414 P.3d 660 (Alaska 2018)

⁵² No. A-12470, 2018 WL 5852649 (Alaska Ct. App. Nov. 9, 2018).

Charles v. State

In *Charles v. State*,⁵³ the Alaska Court of Appeals held that revoking a defendant's probation for "good cause" does not necessarily depend on the defendant's willful violation but on whether the corrective aims of probation can be achieved. James Allen Charles Jr. was a repeat sex offender whose probation and parole had been revoked multiple times. Charles struggled to meet his probation obligations, frequently arriving late to his appointments and testing positive for drug and alcohol use. Consequently, the State petitioned to revoke Charles's probation for missing a polygraph appointment. Despite Charles's "honest mistake," the superior court found that Charles had failed to take reasonable steps to avoid missing his appointment. Because his failure to attend had not been due to circumstances outside his control, the superior court determined the violation reflected "a larger pattern of noncompliance with his probation obligations and a failure to fully engage in treatment." On appeal, Charles argued that it was error to revoke his probation without a finding that he had "willfully" violated its terms. The supreme court disagreed, explaining that the good cause required to revoke probation under section 12.55.110 of the Alaska Statutes does not necessarily require a willful violation. However, the court also rejected the state's argument that a defendant's culpability was irrelevant. Instead the court reasoned that it was one of three factors relevant to determining whether good cause exists: (1) the nature of the probation condition violated, (2) the mental state of the violator, and (3) the significance of the violation in terms of whether the defendant is "amenable to continued probation supervision." The court concluded that good cause exists when continuing the probationary status would "be at odds with the need to protect society and society's interest in the probationer's rehabilitation," and that revocation of probation should only occur when it appears that the "corrective aims of probation cannot be achieved." Applying this, the court concluded that the superior court's finding of a pattern of noncompliance was sufficient to support its revocation of Charles's probation. Affirming, the court of appeals held that revoking a defendant's probation for "good cause" does not necessarily depend on the defendant's willful violation but on whether the corrective aims of probation can be achieved.

Chinuhuk v. State

In *Chinuhuk v. State*,⁵⁴ the court of appeals held that felony sex offenders sentenced under § 12.55.125(o) must serve out their probation, despite completing their term of imprisonment. Section 12.55.125(o) requires that courts suspend a specified amount of the imprisonment term of a defendant convicted of a sexual felony, and that the felon be placed on probation for a specified number of years after completing their term of imprisonment. The five felony sex offenders in this consolidated appeal violated probation. At their probation revocation hearings, they requested that the superior court impose their remaining suspended jail time and terminate their probations. The superior court refused to terminate their probations because § 12.55.125(o) declared that special terms of probation imposed under it could not be suspended or reduced. The felony sex offenders appealed, arguing there was no indication the legislature intended to alter the normal rule that probation must be accompanied by a suspended term of imprisonment. The court of appeals rejected this argument and found that the legislature intended to impose mandatory probation, which could not be suspended or refused, on all felony sex offenders. Furthermore, the legislature enacted § 11.56.759 one year after § 12.55.125(o), which ensured the mandatory probation term

⁵³ No. A-12119, 2018 WL 6817302 (Alaska Ct. App. Dec. 28, 2018).

⁵⁴ 413 P.3d 1215 (Alaska Ct. App. 2018).

remained enforceable even if a sex offender completed the entire term of imprisonment. Thus, the court of appeals affirmed and held that felony sex offenders sentenced under § 12.55.125(o) must serve out their probation, despite completing their term of imprisonment.

Hamburg v. State

In *Hamburg v. State*,⁵⁵ the Court of Appeals held that the pre-2018 version of the Alaska bail statute, formerly section 12.30.011 of the Alaska Statutes, violated the constitutional provision requiring reasonable conditions of bail release be set for a defendant who has not yet been convicted. Hamburg was charged with manslaughter and criminally negligent homicide as a result of the death of her two-year-old daughter. Hamburg's bail release eligibility was governed by the pre-2018 version of Alaska's bail statute. The statute declared that when a criminal defendant is charged with manslaughter, a rebuttable presumption exists that the defendant should not be released on bail. Applying this presumption, the superior court issued a no-bail order. Hamburg appealed arguing the order violated the Alaska Constitution's bail provisions. In response, the State argued that the statute could be constitutionally interpreted so that a defendant, who is presumed to not be releasable, bears the burden of demonstrating that certain bail conditions would ensure the defendant's appearance at future proceedings and the safety of victims and the public. The Court of Appeals disagreed, reasoning that precedent and the Alaska Constitution guarantee a right to pre-conviction bail. The court concluded that both the statute violated this guarantee. It further reasoned that an alternative interpretation of the statute, that would require a defendant offer up conditions of bail but place the burden of persuasion on the state, would also violate the constitution. Directing the trial court to set bail conditions, the Court of Appeals held the pre-2018 version of the Alaska bail statute violated the constitutional provision requiring reasonable conditions of bail release for a defendant who has not yet been convicted.

Hess v. State

In *Hess v. State*⁵⁶ the Supreme Court of Alaska held that a prosecutor's unsupported improper statements during closing arguments constitute plain error if they meet all four prongs of the *Adams v. State* test. In September 2011, Anchorage police were called to a reported assault of Patricia Hess by her son Christopher. As part of the defense strategy, witnesses testified that Patricia forgot to take her medicine, exaggerated things, and was a danger to herself. The prosecutor during his closing remarks responded to this by arguing that Patricia was being "vilified" as a former victim of sexual assault, and he speculated about her mental health and her family's motives in testifying against her though evidence at trial had not gone into those subjects. Hess did not object to any of these statements in closing argument. On appeal, Hess argued for the first time that the prosecutor's closing arguments were improper, and despite his failure to object at trial, he argued the statements constituted plain error. The Supreme Court of Alaska reviewed Hess's claim using the four-part test for plain error review established in *Adams v. State*. It explained that all four factors must be met to constitute plain error: "(1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision to not object; (2) the error must be obvious, meaning it should be apparent to any competent judge or lawyer; (3) the error must affect substantial rights, meaning that it must pertain to the fundamental fairness of the proceeding; and (4) the error must be prejudicial." The court elaborated that, on the issue of prejudice, the state

⁵⁵ No. A-13165, 2018 WL 4844222 (Alaska Ct. App. Oct. 5, 2018).

⁵⁶ No. S-16466, 2018 WL 6718592 (Alaska Dec. 21, 2018).

has the burden of proving constitutional error was harmless beyond a reasonable doubt, and that for a non-constitutional error the defendant has the burden of proving there is a reasonable probability that it affected the outcome of the proceeding. Ultimately, the court held that all four-prongs of the *Adams* test were satisfied. It explained that first, Hess did not waive his objection and had not chosen to abstain from objecting for tactical reasons. Second, the prosecutor's argument lacked evidentiary support and "improperly denigrated the defense lawyer's trial strategy." Third, Hess' fundamental rights were impacted because the prosecutor's statements created a high potential for unfair prejudice. Fourth, the Court held that there was a reasonable probability that the prosecutor's statements impacted the trial's outcome, especially because "prejudicial comments made during closing arguments are more likely to be prejudicial and less likely to be mitigated by curative instructions." Reversing, the supreme court held that a prosecutor's unsupported improper statements during closing arguments constitute plain error if they meet all four prongs of the *Adams v. State* test.

Johnson v. State

In *Johnson v. State*,⁵⁷ the court of appeals held that a court must affirmatively assess probation conditions restricting familial association with special scrutiny. In 2012, during an altercation between Johnson and a man named Michael Plummer, Plummer was stabbed and killed by Johnson's son Spencer. Johnson plead guilty to manslaughter, but the terms of his probation following his incarceration were left open to the court. It adopted a probation condition that prevented Johnson from knowingly associating with another felon, with exceptions for his wife (who had an unrelated felony conviction) and son so long as each party remained in compliance with his or her parole. On appeal, the state argued that the court of appeals had no jurisdiction to hear Johnson's appeal because Johnson agreed to his term of imprisonment in his plea bargain. The court distinguished Johnson's term of imprisonment and his probation conditions, recognizing that Johnson appealed the latter and that accordingly the court had jurisdiction. The court found that Johnson's probation conditions restricted his constitutional rights of familial association, and that the lower court needed to apply special scrutiny to these conditions. Concluding that nothing in the record supported a necessary restriction of association between Johnson and his wife, the court reversed that probation condition. As to the condition restricting association with his son, the court vacated and remanded, observing that the lower court did not subject the condition to special scrutiny and expressing concerns about the vague and broad operation of the condition in practice. Otherwise affirming the lower court's decision, the court of appeals held that a court must affirmatively assess probation conditions restricting familial association with special scrutiny.

Jordan v. State

In *Jordan v. State*,⁵⁸ the Supreme Court of Alaska held (1) that failure to instruct the jury on an essential element of a crime is a structural error and so is not susceptible to harmless error review, and (2) that a mental state as toward the weight of marijuana in a defendant's possession is an essential element. Police found 15 marijuana plants on Jordan's property. Possession of four or more ounces of marijuana is a felony. The police used a non-statutorily approved method to determine that the weight of the marijuana was in excess of four ounces. At trial, Jordan wanted to testify that he did not expect the amount of marijuana to be above four ounces when measured

⁵⁷ 421 P.3d 134 (Alaska Ct. App. 2018).

⁵⁸ 420 P.3d 1143 (Alaska 2018).

by the statutory method. The trial judge denied the testimony and did not require the state to prove that Jordan knew the amount of marijuana in his possession. The court of appeals rejected the state's argument that the criminal statute did not require proof of a mental state and held that it was error to exclude Jordan's testimony, but it concluded that these errors were harmless and so it affirmed. Jordan petitioned for review arguing that the trial court's errors were structural and not subject to harmless error review. Reversing the court of appeals, the supreme court found failure to instruct the jury as to a mental state was a structural error because it affected the framework of the trial rather than just the trial process. Assuming that Jordan's marijuana possession implicated his constitutional privacy rights, the supreme court explained that denying Jordan a jury instruction on his mental state "essentially direct[s] a verdict for the prosecution on one of the essential elements of the charge," thereby altering the very framework of the case and infringing on Jordan's right to a jury trial. The supreme court elaborated that this also constituted a structural error because applying harmless error review would create practical problem. Reversing and remanding, the supreme court held that (1) to fail to instruct the jury as to every essential element is structural error requiring automatic reversal, and (2) if possession of marijuana implicates a privacy right, a mental state toward the weight of that marijuana is an essential element.

Lambert v. State

In *Lambert v. State*⁵⁹ the court of appeals held that the *Osborn* standard does not apply to applications for post-conviction DNA testing under section 12.73 of the Alaska Statutes. In 1982, Ann Benolken and her husband were raped and killed in a double-homicide committed by two individuals. Lambert was convicted of the murder of Ann while his alleged accomplice Telles was acquitted of both murders. In 2010, the Alaska legislature enacted a post-conviction DNA testing statutory scheme, which allows defendants to seek DNA testing in support of a claim of factual innocence. Lambert filed an application for DNA testing of the remaining physical evidence from his case, arguing that it could lead to the true perpetrators of the murder. Applying *Osborn*, the superior court found that Lambert failed to show that DNA testing would conclusively establish his innocence and denied his application. On appeal, Lambert argued that the superior court erred by holding him to a higher standard than the statute required. The court of appeals agreed, explaining that section 12.73.020(7) of the Alaska Statutes only requires a defendant to show that DNA testing, if favorable, could indicate a "reasonable probability" that the petitioner is innocent. The court explained that the superior court erred in applying the *Osborn* standard for post-conviction DNA testing, because *Osborn* supplied the standard that had to be met in the absence of a statutory right to post-conviction DNA testing. The court concluded that since a statutory right now existed, the *Osborn* standard no longer applied. However, the court noted that Lambert had failed to challenge other substantial evidence supporting his conviction, including his own testimony, and that the superior court did not err in concluding that Lambert failed to show that favorable DNA testing would raise a reasonable probability that the outcome of trial would be different. Thus, the court of appeals affirmed the result below while holding that the *Osborn* standard did not apply to applications for post-conviction DNA testing under section 12.73 of the Alaska Statutes.

⁵⁹ No. A-11699, 2018 WL 6005629 (Alaska Ct. App. Nov. 16, 2018).

Marshall v. State

In *Marshall v. State*,⁶⁰ the Court of Appeals of Alaska held that a defense counsel's stipulation to an element of an offense is procedurally permissible, even without a personal waiver by the defendant, so long as the trial court instructs the jury on all of the elements of the offense, including the element covered by the stipulation. Defendant Marshall was a convicted sex offender who was required to register. Marshall complied with his registration requirements until June 2013, when he failed to submit his annual registration. He was arrested and charged with second-degree failure to register as a sex offender. A person commits the crime if he (1) is required to register; (2) knows that he is required to register; and (3) fails to file the annual or quarterly written verification. At the beginning of trial, Marshall's attorney offered to stipulate to the first element to prevent the jury from learning that Marshall's underlying sex offense was for sexual abuse of a minor. Marshall himself did not personally waive the first element. The trial court instructed the jury on all of the elements of the offense, including the element covered by the stipulation, and on the State's burden to prove each element beyond a reasonable doubt. The jury found Marshall guilty. Marshall appealed, arguing that the stipulation effectively removed an element of the charged offense from the jury's consideration and it was therefore an error for the court to instruct the jury on the stipulation without first obtaining Marshall's personal waiver of his right to a jury trial on that element. The court of appeals disagreed. It explained that in a jury trial, even when the parties reach a stipulation concerning an element of the offense, the stipulation must be presented to the jury. It explained that the stipulation merely serves as evidence, and the jury must still make a determination as to the element of the crime it supports. The court of appeals concluded that therefore the stipulation did not remove an element from the jury's consideration, and so no personal waiver by the defendant was needed in this case. Therefore, affirming the trial court's decision, the court of appeals held that a defendant's stipulation to an element of an offense is procedurally permissible, even without a personal waiver by the defendant, so long as the trial court instructs the jury on all of the elements of the offense, including the element covered by the stipulation.

McGuire v. State

In *McGuire v. State*,⁶¹ the Alaska Court of Appeals held that when an officer has probable cause to arrest an individual for a drug offense, and has reason to believe that the individual might have other evidence of that offense on his person, the officer is authorized to conduct a pat-down search. During a traffic stop, McGuire was asked to step outside of his car because his insurance was invalid. McGuire informed Officer Butler that he had a pocketknife in his front right pocket. During the pat-down, but before locating the pocketknife, Butler found a marijuana pipe. Butler continued the pat-down, found the pocketknife, and then found more drug paraphernalia. McGuire was indicted on two counts of fourth-degree controlled substance misconduct and one count of sixth-degree controlled substance misconduct. Following his indictment, McGuire requested suppression of most of the evidence against him, claiming that Officer Butler violated his Fourth Amendment rights when Butler continued patting-down McGuire after finding the pocketknife. The trial court denied this request and McGuire was convicted of all three drug charges; he appealed. The court of appeals reasoned that the discovery of the marijuana pipe before obtaining the pocketknife made it reasonable to suspect that McGuire may be carrying more

⁶⁰ No. A-12131, 2018 WL 6582296 (Alaska Ct. App. Dec. 14, 2018).

⁶¹ 425 P.3d 203 (Alaska Ct. App. 2018).

evidence of that crime. Affirming the superior court's decision, the court of appeals held that when an officer has probable cause to arrest an individual for a drug offense, and has reason to believe that the individual might have other evidence of that offense on his person, the officer is authorized to conduct a pat-down search.

Medina v. State

In *Medina v. State*,⁶² the court of appeals held that probationers are able to seek credit for time spent in earlier court-ordered treatment programs for the purposes of subsequent probation revocation proceedings. After Medina violated his probation, the superior court ordered him to complete a residential treatment program. Although Medina successfully completed the program, he then violated his probation again the following year, causing the superior court to impose a portion of his previously suspended sentence. Medina requested credit for the time spent in the treatment program, but the State argued that Medina's time in treatment was not served "in connection" with the later probation violation. The superior court agreed with the State, reasoning that granting credit for earlier programs would create a "reserve of credit" that could nullify the penalties of later probation violations. The court of appeals reversed, reasoning that probation revocation proceedings are not independent of the original criminal proceedings, acting rather as continuations. Further, it concluded that worries about reserve of credit were outweighed by constitutional concerns that defendants may serve sentences longer than originally imposed. Reversing the lower court, the court of appeals held that probationers are able to seek credit for time spent in earlier court-ordered treatment programs for the purposes of subsequent probation revocation proceedings.

Osborne v. State

In *Osborne v. State*,⁶³ the court of appeals held that, to obtain a search warrant covering anyone arriving at a premises during the execution of the warrant, the police must affirmatively establish good reason to believe that any and all persons who arrive will likely be participants in the criminal activity investigated. In *Osborne*, the police executed an arrest warrant at the residence of a third party, Young. After discovering a number of drug related items throughout the residence, the police applied for a second warrant to search the premises. A boilerplate attachment to the warrant, listing items to be searched, contained a provision granting authority to search any person on the premises. But the warrant application did not reference this provision, nor did it explain the need for this grant of authority or why it might be justified. During the search, the defendant, Osborne, knocked on the door and he was then detained, questioned, and searched. The police discovered \$8,390 in cash, 3.5 grams of methamphetamine, and a cell phone containing texts between Young and Osborne. Armed with this evidence, the police obtained a warrant to search Osborne's house, where they seized drugs, money, and weapons. Osborne was later convicted of a number of drug and weapons offenses. Prior to the trial, Osborne's attorney filed a motion to suppress the evidence found during the search of Osborne and the search of his house. He argued that the initial search was unlawful because the police failed to establish probable cause granting them the authority to search any person who arrived on the premises, and that the evidence obtained during the second search was the fruit of the unlawful first search. The superior court rejected this argument, siding with the State, which argued that because the warrant established probable cause that illegal drugs

⁶² 418 P.3d 861 (Alaska Ct. App. 2018)

⁶³ 421 P.3d 113 (Alaska Ct. App. 2018).

were sold out of the residence, there existed a logical inference that any and all persons who arrived on the premises during the search would also be buying or selling drugs. The court of appeals reversed the lower court, holding that to obtain a broad grant of search authority, the police must at least acknowledge they are asking for the right to search unknown persons and provide a showing of probable cause, typically by detailing the character of the premises, the nature of the illegal activity, the number and behavior of persons expected at the premises, whether some of these people are unconnected with the illegal conduct, and the precise area and time the illegal activity will take place. The court of appeals remanded the case for consideration of the State's alternative argument that the police had independent, lawful reasons to detain and search Osborne.

Pulusila v. State

In *Pulusila v. State*,⁶⁴ the Alaska Court of Appeals held that in interpreting a condition of probation, a court must consider (1) whether a particular interpretation would ensure public safety or foster the defendant's rehabilitation, and (2) how a reasonable person in the defendant's place would understand the probation condition. In September 2016, Pulusila was on felony probation. As part of his probation, Pulusila was prohibited from having (1) any ammunition or explosives in his "custody, residence, or vehicles" or (2) any drug paraphernalia in his "residence or . . . any vehicle under his control." After borrowing another man's truck, Pulusila was pulled over by the Anchorage police. The police searched the truck and found a small explosive device, ammunition for a firearm and a methamphetamine pipe. Based on this discovery, the State petitioned the superior court to revoke Pulusila's probation. Pulusila asserted that the truck was borrowed and he was unaware of the discovered items; he argued that because he had no mental culpability his probation should not be suspended. The superior court rejected this argument, applied strict liability, and revoked Pulusila's probation. The court of appeals reversed, explaining that a reasonable person in Pulusila's circumstances would not understand the conditions of probation to allow revocation of probation for unknowing possession of prohibited items. The court further explained that because conditions of probation must be reasonably related to rehabilitating an offender or protecting the public, ambiguous conditions should be given a meaning to further those purposes. The court found there was no clear public benefit to using a strict liability standard. Reversing the lower court, the court of appeals held that in interpreting a condition of probation, a court must evaluate (1) whether a particular interpretation would ensure public safety or foster the defendant's rehabilitation and (2) how a reasonable person in the defendant's place would understand the probation condition.

R.C. v. State

In *R.C. v. State*,⁶⁵ the court of appeals held that courts are authorized to consider a juvenile's ability to pay when setting the amount of restitution. In 2014, at the age of fifteen, R.C. and another juvenile started a damaging fire on an elementary school playground. R.C. admitted guilt and was charged as a delinquent minor. At the restitution proceedings, the State argued that R.C. and the other juvenile should be jointly and severely liable for the full amount of the damages caused by their actions, which would make R.C. (and his parents) personally liable for \$159,161.71. After acknowledging R.C.'s limited assets, the superior court adopted a payment schedule that addressed R.C.'s ability to pay, but that did not adjust the amount owed on that basis. R.C. appealed this

⁶⁴ 425 P.3d 175 (Alaska Ct. App. 2018).

⁶⁵ 2018 WL 6133548 (Alaska Ct. App. 2018).

ruling, arguing that he did not have the financial means to pay the restitution amount, and that the trial court should have considered this when determining the amount of restitution to be ordered. The court of appeals vacated and remanded the trial court's decision, finding that R.C.'s argument was supported by the plain meaning and legislative intent of section 47.12.120(b)(4) of the Alaska Statutes. The court of appeals distinguished restitution proceedings for adults, where ability to pay may not be considered, from those for minors by focusing on the statutory language requiring that restitution for minors be "suitable." The court reasoned that this indicated financial information from the minor and the minor's parents should be considered in setting the amount of restitution. Moreover, the court of appeals asserted that both the legislative history of the statute and prior caselaw indicated that in the State of Alaska restitution is designed to not just be helpful to the victim, but to also aid in the rehabilitative process. It explained that setting restitution for minors above what could possibly be paid would be detrimental to the rehabilitative process cutting against the purpose of the juvenile justice system. Vacating and remanding the lower court's decision, the court of appeals held that courts are authorized to consider a juvenile's ability to pay when setting the amount of restitution.

Silas v. State

In *Silas v. State*⁶⁶ the Alaska Court of Appeals held that revoking an individual's probation requires a finding of good cause. Roy Silas was convicted of second-degree sexual abuse of a minor and served a term of active imprisonment followed by 10 years of probation with a 5-year suspended term of imprisonment. A condition of his probation was that he participate in a sex offender treatment program as directed by his probation officer, and that he not discontinue the program without approval from his probation officer. Silas participated in a program for more than a year, until he was arrested for the theft of a computer. Following his release, he attempted to reenter the program, but was terminated by the director for possessing pornographic videos, for failure to abide by a curfew, and for unwillingness to fully engage in treatment. At his subsequent revocation hearing, Silas contended that he did not "discontinue" his treatment, but rather that he was terminated against his will and therefore did not violate the terms of his probation. The superior court judge indicated that the reasons for Silas's termination were irrelevant, and that his termination alone was sufficient to show good cause for revocation. The appellate court reversed and remanded, saying *Pulusila v. State* and *Trumbly v. State* require "good cause" for revocation of probation, meaning the revoking court must find "the corrective aims of probation cannot be achieved," and that "continuation of probationary status would be at odds with the need to protect society and society's interest in the probationer's rehabilitation." Although the court stipulated that involuntary termination could in some instances lead to a finding of good cause for revocation, the lack of fact-finding in this case provided an insufficient record to resolve that question. The appellate court held that the superior court should have determined whether the circumstances of Silas's termination from the program indicated that the probationary aims could not be met, or that the continuation of probation would be contrary to protection of society and to Silas's rehabilitation.

⁶⁶ 425 P.3d 197 (Alaska Ct. App. 2018).

State v. Arredondo

In *State v. Arredondo*,⁶⁷ the court of appeals held that (1) spousal communications must be intended to remain confidential in order to be subject to spousal privilege, and (2) a defendant waives marital communications privilege by using it to exclude information that he made necessary to avoid a distortion of the fact-finding process. Police found Arredondo's vehicle abandoned next to a freeway exit. The primary issue at trial was whether Arredondo was the one who wrecked the vehicle. As evidence, the state called Arredondo's mother-in-law, McDole, to testify about a conversation she had with her daughter, Jackie, about Arredondo shortly after the accident. Jackie told McDole that Arredondo woke Jackie up and asked for help. Soon after, Jackie arrived at the scene of the accident with a friend, but not Arredondo. At trial Arredondo attempted to excluded evidence of his conversation with Jackie so that he could argue that Jackie knew where the accident occurred because she caused it, not because Arredondo told her. On appeal, Arredondo argued that he should be able to invoke the marital communications privilege to prevent a third party from testifying about a conversation with his wife. The court of appeals affirmed the lower court's decision, reasoning that the marital communications privilege applies only to those spousal communications intended to remain confidential, and Arredondo's request for help was a delegation of authority to Jackie to deal with third parties rather than a confidential communication. The court further reasoned that because Arredondo attempted to use marital privilege to exclude information that he made material to the fact-finding process by creating an information gap, he waived the marital communications privilege. Affirming the lower court's decision, the court of appeals held that (1) spousal communications must be intended to remain confidential in order to be subject to spousal privilege, and (2) a defendant waives marital communications privilege by using it to exclude information that he made necessary to avoid a distortion of the fact-finding process.

State v. Baker

In *State v. Baker*,⁶⁸ the Court of Appeals held that criminal offenses arise out of the "same criminal episode" for purposes of calculating a defendant's speedy trial rights only when there is a close elemental or evidentiary overlap between the charged offenses, or when the commission of one criminal offense has a causal connection to another. Responding to a tip, an Alaska State Trooper observed Timothy Baker operating a vehicle and conducting what appeared to be a drug deal at a local gas station. The trooper approached Baker and requested his identification at which point Baker ran, abandoning several small bags filled with a white powdery substance. After catching Baker, the trooper determined Baker's driver's license was revoked. Baker was placed under arrest and charged with driving with a revoked license. Baker was not charged with any drug-related crimes at that time. Three months after the arrest Baker pled guilty to driving without a license. In the interim, the State uncovered evidence that Baker was engaged in drug distribution and confirmed that the white powder was in-fact cocaine. Approximately four months after Baker's initial arrest for driving with a revoked license, the State indicted him for possession of cocaine with intent to sell. Baker moved to dismiss the indictment, arguing that the drug charge arose from "the same criminal episode" as his prior arrest and that therefore the speedy trial time for the drug charge started to run when he was charged for driving with a revoked license. The superior court granted Baker's motion to dismiss, finding that the two charges arose from the "same criminal

⁶⁷ 411 P.3d 640 (Alaska Ct. App. 2018).

⁶⁸ 425 P.3d 210 (Alaska Ct. App. 2018).

episode” because Baker’s act of driving helped facilitate the drug deal. The court concluded that the 120 speedy trial time had already passed and so it dismissed the felony drug indictment. The Court of Appeals reversed the lower court’s decision, finding that there was no evidentiary, elemental, or causal connection between the two otherwise separate criminal acts: driving without a license and possession of cocaine. The appellate court explained that Baker’s driving played no essential part in the drug offense as he could have easily walked to the site of the drug deal. It further noted that Baker’s driving was irrelevant to the drug offense for evidentiary purposes and that it was no essential element of the drug charge. The appellate court concluded that because the only nexus between the two offenses was temporal and incidental the State could prosecute Baker for the crime of driving with a revoked license without triggering Baker’s right to a speedy trial on the drug offense. Reversing the lower court’s decision, the Court of Appeals held that criminal offenses should be considered as arising out of the “same criminal episode” for purposes of calculating a defendant’s speedy trial rights only when there is a close elemental or evidentiary overlap between the charged offenses, or when the commission of one criminal offense has a causal connection to another.

State v. Bell

In *State v. Bell*,⁶⁹ the court of appeals held that section 12.55.027(d) of the Alaska Statutes requires a defendant lose all credit toward their sentence for a period of release on bail subject to electronic monitoring if it ends because the defendant commits a new crime. In 2015, section 12.55.027(d) of the Alaska Statutes was amended to grant trial courts authority to count time on electronic monitoring while on bail release against a defendant’s sentence of imprisonment provided, amongst other conditions, that the defendant had not, “committed a criminal offense while under electronic monitoring.” Robert Daniel Bell was convicted of second and third-degree theft. While Bell was appealing his conviction he was granted bail and served three distinct periods on electronic monitoring. Period I ended when Bell was taken into custody for allegedly violated the terms of his release. Period II ended when Bell was arrested for third-degree theft to which he later plead guilty. Period III ended when Bell’s appeal concluded. The superior court gave Bell credit for all of the time he spent on electronic monitoring, with the exception of the day he was arrested, ending Period II. All parties agreed Bell should get credit for Period III. The State argued that Bell should not get any credit for Period II because he committed a crime while on electronic monitoring. Bell responded that the trial court had statutory discretion to determine how much credit would be lost because of a new offense. The court of appeals agreed with the State, reasoning that Bell forfeited all credit for Period II when he committed a new crime. The court relied on a broad consensus around this interpretation revealed in the legislative history of the statute. The court of appeals decided to remand the question of Period I to the superior court for factual findings as to whether Bell had actually violated the terms of his release, causing him to lose credit for that period. Affirming, reversing, and vacating the superior court in part, the court of appeals held that a defendant loses all credit for a period of electronic monitoring when they commit a new offense.

State v. Groppe

In *State v. Groppe*,⁷⁰ the Supreme Court of Alaska held that experts appointed under section 12.47.070 of the Alaska Statutes are the court’s experts, that the superior court must appoint

⁶⁹ 421 P.3d 128 (Alaska Ct. App. 2018)

⁷⁰ 433 P.3d 1113 (Alaska 2018).

qualified experts from the Alaska Psychiatric Institute (API) unless there is a legitimate reason not to, and that if it appoints non-API experts, the court system must bear their costs. If a defendant's mental capacity is in issue, section 12.47.070 of the Alaska Statutes directs the court to appoint at least two qualified psychiatrists or psychologists certified by the American Board of Forensic Psychology to determine the mental condition of the defendant. Groppe was charged with first and second-degree murder, along with a plethora of other charges, and subsequently notified the court that he might rely on a diminished capacity defense. The superior court discovered that API did not have any psychiatrists statutorily qualified to conduct the examination. The superior court therefore ruled that it would appoint two non-API statutorily qualified experts, one for each party, and that each party was to bear the cost of its own expert. Both the State and Groppe appealed. The Alaska Supreme Court found that legislative history revealed the legislature intended to provide non-partisan experts and that the Model Penal Code further supported that conclusion. It also determined that trial courts have historically appointed API to perform the psychiatric evaluations and that that historical practice was sound. Further, it reasoned that because experts appointed under section 12.47.070 of the Alaska Statutes are supervised by and report directly to the court they are the court's experts and must be funded by it if not from API. Vacating the superior court's order, the Supreme Court of Alaska held that experts appointed under section 12.47.070 of the Alaska Statutes are the court's experts, that the superior court must appoint qualified experts from API unless there is a legitimate reason not to, and that if the court appoints non-API experts, the court system must bear their costs.

State v. Ranstead

In *State v. Ranstead*,⁷¹ the supreme court held that a sentencing court need not make particularized findings to support uncontested conditions of probation, and that a defendant must object to a proposed condition of probation to preserve it for appeal. Defendant Ranstead plead guilty to second-degree sexual assault. His presentence report recommended imprisonment followed by probation with 11 general conditions and 26 special conditions. Ranstead objected to 10 conditions. The superior court overruled his objections and imposed all recommendations. In doing so it did not make findings as to the uncontested conditions though it reviewed the record. Ranstead appealed, challenging a general condition he had not objected to in the superior court, as well as 10 special conditions, one of which he had also not objected to in the superior court. The court of appeals rejected Ranstead's challenge to the general condition, but it vacated the ten special conditions, and struck down two more that Ranstead had not objected to or challenged on appeal. Finally, it vacated all remaining conditions, even though Ranstead had not objected to them or raised them on appeal either. In doing so, the court of appeals relied on *Beasley v. State*, which precluded a sentencing judge from adopting conditions proposed in the presentence report without reviewing them critically. The supreme court reversed, holding that a superior court need not make findings as to the uncontested probation conditions. It emphasized that nothing in the Alaska Rules of Criminal Procedure, particularly Rule 32, requires a court to do such, and that counsels' role in calling attention to proposed conditions is integral to assisting a trial court in imposing a sentence. As to preserving issues for appeal, the court did not deem it necessary to depart from the procedural principle that a party forfeits its right to appeal an issue when the party fails to timely object to it. The court highlighted the importance of the rule in focusing litigation at the trial level, and the role this principle plays in developing a robust record for appellate review. The supreme court therefore

⁷¹ 421 P.3d 15 (Alaska 2018).

overruled *Beasley*, reversing the court of appeals' decision to vacate conditions to which Ranstead did not object, holding that: (1) the superior court need not affirmatively review uncontested conditions of probation; and (2) the defendant must object to probation conditions at the superior court level, or else he forfeits his right to appeal those issues.

State v. Thompson

In *State v. Thompson*,⁷² the court of appeals held that bail violations during a certain period were not per se criminal offenses and so do not disqualify defendants from getting credit for time served while under electronic monitoring. In February 2016, Thompson was arrested for driving under the influence and released on pre-trial bail with electronic monitoring. In July of 2016, while being monitored, Thompson allegedly violated his bail conditions by consuming alcohol and testing positive for several illicit substances. Thompson eventually plead guilty to several charges and at sentencing requested the superior court give him credit for time served on electronic monitoring, the state opposed this. Under 12.55.027 of the Alaska Statutes, trial courts have the authority to grant credit to a defendant for time served while released on bail subject to electronic monitoring, provided the person has not committed a criminal offense while being monitored. Between July 2016 and November 2017, the violation of a bail condition was not a crime in Alaska. Because of this, the superior court held that Thompson was still eligible to receive credit for time served because his bail violations were non-criminal; the state appealed. The court of appeals affirmed applying Alaska's sliding scale approach to statutory interpretation that eschews reliance on just the plain meaning. The court of appeals explained that before November 2017, the statute's later legislative history reflected a desire make bail violations civil violations rather than criminal misdemeanors, even if earlier legislative history had indicated a desire for bail violations to constitute a crime. As the legislative history was susceptible to two reasonable constructions, the court of appeals determined that the plain meaning of the statutory text controls. The court of appeals affirmed, holding that non-criminal bail violations were not considered criminal offenses between July 2016 and November 2017, and therefore bail violations during that period do not disqualify defendants from getting credit for time served on bail while under electronic monitoring.

Tanner v. State

In *Tanner v. State*,⁷³ the court of appeals held that an Alaska Statute,⁷⁴ governing credit for time served while subject to electronic monitoring, did not authorize credit to be awarded if a person is allowed to go grocery shopping because grocery shopping is not an implicitly authorized exception to the statute's required restraints, and it also does not qualify as a rehabilitative activity.⁷⁵ After serving time in prison, Tanner was placed on probation. But when his probation was revoked, and he was subsequently released on bail, Tanner was subjected to electronic monitoring. The terms of his contract with the monitoring company, adopted by the court, allowed Tanner to leave home for a variety of reasons, including grocery shopping. Tanner eventually filed a motion seeking credit for the 212 days he served subject to electronic monitoring. The superior court denied his motion because the electronic monitoring agreement allowed Tanner to go grocery shopping, finding this was not sufficiently restrictive to satisfy the statutory requirements for awarding time

⁷² 425 P.3d 166 (ALASKA CT. APP. 2018).

⁷³ No. A-12617, 2018 WL 6582291 (Alaska Ct. App. Dec. 14, 2018).

⁷⁴ Alaska Stat. § 12.55.027(d) (2018).

⁷⁵ *Id.* at *2–3.

served. Tanner appealed arguing that because grocery shopping is an essential activity the statute should be construed to implicitly authorize it, or that in the alternative it constituted “rehabilitative activity” which is explicitly authorized by the statute. The court of appeals affirmed the ruling of the superior court, reasoning that while it would be reasonable for the legislature to allow for occasional grocery shopping, it was not ridiculous to distinguish it from activities that the statute chose to authorize. The court noted that unlike the statute’s other exceptions, in which a separate party would notice if the defendant failed to show up, no one would notice if the defendant did not actually go grocery shopping when he claimed to do so. Further, the court reasoned that grocery shopping does not qualify as attending a rehabilitative activity, as grocery shopping does not normally fit into a plain understanding of “rehabilitation,” and one does not normally “attend” a grocery trip. In affirming the superior court, the court of appeals held that an Alaska Statute, governing credit for time served while subject to electronic monitoring, did not authorize credit to be awarded if a person is allowed to go grocery shopping because grocery shopping is not an implicitly authorized exception to the statute’s required restraints, and it also does not qualify as a rehabilitative activity.

Thomas v. State

In *Thomas v. State*,⁷⁶ the court of appeals held that a sentencing judge must engage in case-specific analysis of the circumstances and facts of the specific case and the particular defendant when determining a need for a special restriction on the defendant’s eligibility for discretionary parole. Thomas pled guilty to second-degree murder for the death of his girlfriend and agreed to receive a sentence of 75 years imprisonment with 25 years suspended (50 years to serve). The superior court judge rejected the negotiated sentence as too lenient, but did not provide specific reasons to support the decision. Instead, the superior court judge made broad statements regarding individuals convicted of murder and their general eligibility for parole. Thomas and the State appealed and argued that the superior court failed to provide adequate reasons for rejecting the negotiated sentence. The court of appeals held that a judge cannot impose a more severe parole restriction on a defendant solely because it believes that the discretionary parole statutes are not sufficiently harsh for the category of crime the defendant committed. It explained that since discretionary parole is difficult to obtain, a sentencing judge cannot consider the defendant’s eligibility for discretionary parole as a factor likely to reduce the jail time that the defendant will serve. Vacating the superior court’s decision, the court of appeals held that a sentencing judge must engage in case-specific analysis of the circumstances and facts of the particular case and the specific defendant when determining a need for a special restriction on the defendant’s eligibility for discretionary parole.

⁷⁶ 413 P.3d 1207 (Alaska Ct. App. 2018).

ELECTION LAW

Mallot v. Stand for Salmon

In *Mallott v. Stand for Salmon*,⁷⁷ the Alaska Supreme Court held that a ballot initiative effects an unconstitutional appropriation if it transfers state assets into private hand or if it infringes on the legislature's ability to allocate resources among competing use. In July 2017, Stand for Salmon submitted ballot initiative 17FSH2 to establish a permitting scheme for projects affecting anadromous fish habitats. The governor declined to certify it concluding portions of it improperly constrained legislative authority to allocate state resources. Stand for Salmon sued and won an injunction to circulate the initiative, arguing it did not infringe on the legislature's authority because, though it prohibited some activities, the legislature retained discretion in how to implement the measure. On appeal the supreme court first highlighted article XI, section 7 of the Alaska Constitution, under which "[t]he initiative shall not be used to . . . make or repeal appropriations."⁷⁸ Reviewing the legal precedent, the court identified two ways in which a ballot initiative could create an unconstitutional appropriation:

An initiative is an impermissible give-away program if it transfers state assets into private hands. An initiative also effects an appropriation if it infringes on the legislature's ability to allocate resources among competing uses—that is, if it fails “to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs”—by forcing the legislature to make a particular allocation decision in the future or by removing certain allocation decisions from the legislature's range of discretion.⁷⁹

Applying this standard to the initiative, the court noted restrictive language that allowed the commissioner to issue a major permit only if the activity would not cause substantial damage to the fish habitat. Finding that this “would completely prevent the legislature from permitting projects that result in the permanent destruction of anadromous fish habitat,” the court conclude the initiative was an unconstitutional appropriation.⁸⁰ Instead of declaring the entire initiative unconstitutional, the court chose to sever the offending language, proposed AS 16.05.885(e)(3) and the third sentence of proposed AS 16.05.887(a). Reversing and remanded to place the amended initiative on the ballot, the court held that a ballot initiative effects an unconstitutional appropriation if it transfers state assets into private hand or if it infringes on the legislature's ability to allocate resources among competing uses.

⁷⁷ 431 P.3d 159 (Alaska 2018).

⁷⁸ *Id.* at 164 (quoting Alaska Const. Art. XI, § 7).

⁷⁹ *Id.* at 166 (quoting *McAlpine v. University of Alaska*, 762 P.2d 81, 88 (Alaska 1988) (emphasis in original)).

⁸⁰ *Id.* at 170.

Marcy v. Matanuska-Susitna Borough

In *Marcy v. Matanuska-Susitna Borough*,⁸¹ the supreme court held that the public interest in reviewing a suit similar to other potential upcoming litigation did not override the claim's mootness. In 2014, Alaska passed a statewide ballot initiative to legalize marijuana, enacting section 17.38 of the Alaska Statutes. It legalized marijuana, but allows local governments to "prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an ordinance or by a voter initiative." Shortly after the law went into effect, a municipal initiative petition titled "Application for Ballot Initiative to Prohibit Marijuana Business Except Those Involving Industrial Hemp in the Matanuska-Susitna Borough" (the Proposed Initiative) was certified for the October 2016 local ballot. Ronda Marcy, a Borough resident who had purchased and outfitted greenhouses to open a marijuana business after passage of section 17.38, filed a complaint for declaratory judgment and injunctive relief 32 days prior to the October election. In late September, the superior court ordered the case held in abeyance pending the election, explaining that absentee voting had already begun, making relief before the election "inherently disruptive and prejudicial to the ordinary voting process." After the Proposed Initiative was rejected in the election, Marcy's moved to stay the execution of judgment, but the court denied her motion finding the issue moot, and dismissed the case without findings of fact or conclusions of law. Marcy appealed on several grounds. The supreme court held that the lower court's abeyance order, issuance of notice of intent to dismiss the case as moot, and dismissal without findings of fact and conclusions of law were not abuses of discretion. In considering Marcy's assertion that the public interest exception override the mootness issue, the court evaluated three issues: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied may repeatedly circumvent review of the issues, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine." The court dismissed Marcy's argument that review would prevent needless litigation repetition over similar initiatives, finding that that an opinion on such similar initiatives' constitutionality would be purely advisory and potentially inapplicable because they were not actually before the court. Preferring to wait for a challenge to one of the proposed or actual laws grounded in facts and therefore avoiding unintended consequences, the court held that the public interest in preventing the opening of a litigation floodgate was not persuasive enough to require review of Marcy's moot constitutional and statutory claims.

Nageak v. Mallott

In *Nageak v. Mallott*,⁸² the Supreme Court held that (1) election challengers must bring an election contest complaint, rather than a recount appeal, if they are alleging only misconduct, fraud, or corruption in the conduct of an election, and (2) the misconduct must be sufficient to change the result of the election before a new election will be ordered. After a recount Dean Westlake defeated Benjamin Nageak for the Alaska Democratic Party's nomination for representative of Alaska House District 40 in the 2016 primary election by eight votes. Nageak filed an election contest complaint, asserting that, among other errors, various election officials erred by giving 50 voters both the ADL and Republican ballots in violation of the rules of each party. Per these rules, registered Alaskan Independence, Democratic, and Libertarian voters may vote only on the "ADL"

⁸¹ 2018 WL 4656606 (Alaska 2018).

⁸² 426 P.3d 930 (Alaska 2018).

ballot, and Republican, Undeclared, and Non-Partisan voters may choose to vote either the ADL or the Republican ballot. The trial court found this error changed the results of the election and so it certified Nageak the winner; on appeal the supreme court disagreed. The supreme court first explained that a claim is properly brought as an election contest complaint rather than as a recount appeal when the underlying issue is misconduct, typically by election officials, rather than a disagreement over vote counting. It then reasoned that a new election should only be ordered if a challenger has shown sufficient misconduct to change the result with every reasonable presumption in favor of the validity of the election. The court found that the election error was the result of misconduct, but was not enough to change the results of the election as Westlake won by eight votes. Consequently, it concluded that the misconduct was not sufficient to trigger a new election. Reversing the trial court and reinstating Westlake as the winner, the supreme court held that (1) election challengers must bring an election contest case, rather than a recount appeal, if they are alleging only misconduct, fraud, or corruption by an election official, and (2) election officials' misconduct must be sufficient to change the result of the election before a new election will be ordered.

State v. Alaska Democratic Party

In *State v. Alaska Democratic Party*,⁸³ the supreme court held the Alaska Constitution's right of free association allows a political party to open its primaries to registered independent candidates. Alaska requires candidates to either win a party primary or secure a certain number of petition signatures to appear on the general election ballot. In order to run in a primary, a candidate must meet certain qualifications, one of which is the "party affiliation rule," which requires that a candidate be registered as a member of the party from which he or she seeks nomination. The Democratic Party amended its bylaws to allow registered independents to run in its primaries. The State Division of Elections refused to allow these candidacies because they violated the party affiliation rule, prompting a constitutional challenge by the party. The superior court granted the Democratic Party's motion for summary judgment, concluding that the party had an associational right to allow independent primary candidates. The supreme court affirmed, finding the party affiliation rule violated Alaska's right of free association in pursuit of political goals provided to both individuals and political parties by article 1, section 5 of Alaska's constitution. The court initially determined that a party's associational rights include the right to choose its general election candidates regardless of their party registration. It explained that because the party affiliation rule prevents a party from determining the "ideological caste" of its candidates, the rule imposes a substantial burden on the right of association. The court noted that while this burden is only moderate under the federal constitution, Alaska's constitution is more protective. The court explained that because the rule imposes a substantial burden it may only be justified if it serves a sufficiently compelling interest and is narrowly tailored to that interest. It determined that the rule did not advance the state's interest in confirming public support exists for the party and similarly was not necessary to ensure the stability of the political system, or to prevent confusion. Finally, the court further found the rule was not narrowly tailored to advance these interests. Affirming the lower court's decision, the supreme court held the Alaska Constitution's right of free association allows a political party to open its primaries to registered independent candidates.

⁸³ 426 P.3d 901 (Alaska 2018).

EMPLOYMENT LAW

Alaska State Comm’n for Human Rights v. Anderson

In *Alaska State Comm’n for Human Rights v. Anderson*,⁸⁴ the supreme court held that a statute mandating confidentiality in investigations permits an agency to exclude third-parties from investigative interviews. An employee of Alaska’s Department of Health and Human Services (DHHS) filed a discrimination complaint with the Commission for Human Rights, which enforces Alaska’s anti-discrimination laws. The Commission subpoenaed the employee’s supervisor, Dori Anderson, as part of its investigation of the complaint under section 18.80.115 of the Alaska Statutes. Anderson refused to comply unless DHHS’s Equal Opportunity Employment Manager, Greta Jones, was present for “support.” The investigator, Patricia Watts, explained multiple times that Jones could not be present as this violated the Commission’s unwritten policy of excluding third parties from investigative interviews, with limited exceptions, to maintain confidentiality. She also warned Anderson that refusal could result in contempt proceedings. Nonetheless, Anderson refused to be interviewed and so the Commission initiated contempt proceedings against her. Anderson moved to dismiss, and the superior court granted her motion. It concluded that the Commission lacked authority to require Anderson appear alone pursuant to an unwritten policy because § 18.80.115 did not explicitly grant this authority unlike some other statutes. On appeal, the supreme court reversed the superior court’s order, finding the statute implicitly authorized exclusion of third parties at interviews. The court focused on the statute’s requirement that investigations be confidential both to the public and to the respondent. It explained that this purpose would be frustrated, and that a witness’s candor could be chilled, by allowing the presence of third parties. Reversing the superior court, the supreme court held that a statute mandating confidentiality in investigations permits an agency to exclude third-parties from investigative interviews.

Atkins v. Intel Transportation & Taxi Service, Inc.

In *Atkins v. Intel Transportation & Taxi Service, Inc.*,⁸⁵ the supreme court held a claimant who fails to obtain written approval from his employer or the Alaska Workers’ Compensation Benefits Guaranty Fund (“The Fund”) before settling a personal-injury claim against a third party, as required by Alaska Workers’ Compensation Act, cannot seek workers’ compensation. In 2009, Atkins, a taxi driver, was in route to pick up a customer when another car hit his taxi head on. The driver of the other car was killed and Atkins was severely injured. Soon after the accident, Atkins obtained an attorney to investigate possible sources of compensation, including through tort suit and claims under the Alaska Workers’ Compensation Act (“The Act”). For a variety of reasons, the workers’ compensation claim was delayed while Atkins sued the estate of the other driver, which ultimately led to a policy-limited settlement against the estate’s automobile insurance. Critically, Atkins did not receive written approval from his alleged employer, Intel, or the Fund, for the settlement before accepting it; approval is required under the Act in order to receive workers’ compensation. As a result, the Workers’ Compensation Board (“The Board”) dismissed Atkins’ claim because he had not obtained the written approval of the Fund or his employer before the settlement. Atkins appealed arguing his employer’s approval was not necessary because (1) the settlement was not a “compromise” under the act, and (2) the settlement did not prejudice his

⁸⁴ 426 P.3d 956 (Alaska 2018).

⁸⁵ 426 P.3d 1124 (Alaska 2018).

employer. The supreme court reject his arguments. First, relying on Black's Law Diction, the court held that an agreement between two parties constitutes a "compromise" for purposes of the Act, and so Atkins' settlement was a compromise. Next, the court concluded that even though Atkins' settlement did not prejudice his employer or the Fund, allowing his claim would violate the clear command of the statute and undermine its protections. The court explained that by settling before a judicial decision was reached Atkins' had violated this clear rule and risked prejudice even though prejudice did not actually result. Additionally, the court distinguished past exceptions to this rule as the result of independent *judicial* determinations after a trial, not settlements at a third-party's policy limit beforehand. Ultimately, affirming the result below, the supreme court held a claimant who fails to obtain written approval from his employer or the Fund before settling a personal-injury claim cannot seek claims for workers compensations even when the failure of the claimant to get prior approval does not prejudice the employer or the Fund.

Burke v. Raven Electric, Inc.

In *Burke v. Raven Electric, Inc.*⁸⁶ the court held that the exclusive remedy provision of the Workers' Compensation Act (the Act) (1) does not violate the due process or equal protection clauses and (2) bars relief under the Defective Machinery Act. The mother of an employee killed at work sought workers' compensation death benefits, arguing that the Act was unconstitutional because it did not sufficiently compensate the loss her daughter's life, and because it failed to account for the mother's future dependency on her daughter. The Alaska Workers' Compensation Board denied the claim, and the Appeals Commission affirmed the decision and ordered the mother to pay for the employer's attorney's fees. Affirming the Appeals Commission's decision, the supreme court rejected the claim that the Act's exclusive remedy provision violates the due process and equal protection clauses. It explained this provision bars parents from bringing suit "on account of [an] injury or death" covered by the Act, and that parents are only entitled to benefits under the Act itself if they are dependent on the child at the time of the child's death. The court concluded that because the mother was not dependent at the time of her daughter's death, she lacked a substantive due process right under the Act. Further, the court dismissed the argument that the Act violates the equal protection clause. It explained that parents who currently depend on their children for income are differently situated from those who might later depend on their children, so the two groups may be treated differently. Additionally, the court declined to overturn its precedent which had held that the Defective Machinery Act only applies to occupations not covered by the Workers' Compensation Act, thereby barring the mother from suing under the Defective Machinery Act. Finally, the court reversed the award of attorney's fees to the employer, reasoning that because the mother was self-represented, and because only the court had jurisdiction to decide the constitutional questions, the appeal was neither unreasonable nor frivolous. Otherwise affirming the judgment below, the court held that the exclusive remedy provision of the Workers' Compensation Act (the Act) (1) does not violate the due process or equal protection clauses and (2) bars relief under the Defective Machinery Act.

Kang v. Mullins

In *Kang v. Mullins*⁸⁷ the supreme court reversed the Alaska Workers' Compensation Appeals Commission, deciding that a woman was not her neighbor's employer when she hired him to

⁸⁶ 420 P.3d 1196 (Alaska 2018).

⁸⁷ 420 P.3d 1210 (Alaska 2018).

complete repairs on a home she rented to use as a residence and place of business. Yong Kang rented a home in North Pole from her son. She lived in the home and used it to operate her business, Lee's Massage. In early 2015, Kang hired her neighbor Alexander Mullins to repair the home's roof. As the work progressed, it became clear that the house also needed to be leveled, and Mullins agreed to take on that job as well. Mullins injured his wrist while working on the leveling project. Soon after, he had a dispute with Kang about compensation and stopped working on the house. When Mullins went to the emergency room for treatment on his wrist, he filed a report of injury with the Workers' Compensation Board, listing Lee's Massage as his employer. After a hearing, the board found that Lee's Massage was Mullins' employer and required the business to compensate him. On appeal, the Workers' Compensation Appeals Commission affirmed the board's decision, finding that based on the "totality of the circumstances" Mullins was employed by Lee's Massage "in connection with a business or industry." Reviewing the commission's decision, the supreme court chose not to focus on the nature of the agreement between Kang and Mullins, opting to analyze Kang's role as a tenant at the property. Because Kang was a tenant, neither she nor her business was obligated to arrange for the repairs to the home that Mullins performed. The supreme court emphasized that Kang was therefore a consumer of rental and repair services, not a producer. Relying on this distinction, the supreme court found that Mullins had not proved he entered into an employment contract with Lee's Massage. Reversing the commission, the supreme court held that for purposes of the Alaska Workers' Compensation Act, a person or entity is not an employer when they hire someone in their capacity as a consumer rather than in connection with their business.

Moody v. Lodge

In *Moody v. Lodge*,⁸⁸ the Alaska Supreme Court held that whether time not spent actively performing duties should be counted towards overtime under the Alaska Wage and Hour Act (AWHA) is determined by applying the standard of *Hutka v. Sisters of Providence in Washington*. From 2002 to 2007, Jeff Moody worked as a pilot for Royal Wolf Lodge. While working at the lodge he resided there, waiting to be called to his duties. In 2008, Moody sued the lodge seeking unpaid overtime under AWA. The superior court found that when not actively carrying out his duties Moody was "waiting to be engaged," rather than "engaged to wait" and was therefore only entitled to 6.4 hours of overtime. The supreme court affirmed. It explained that because the AWA mandates overtime pay if an employee works over eight hours in a day, the analysis of whether overtime pay is owed centers on how much time was spent "actually working." The supreme court concluded that the superior court had correctly assessed this by applying the standard from *Hutka*: "(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties." Noting that no agreement appeared to exist, the supreme court explained it was proper for the superior court to use the non-exhaustive list of illustrative factors from *Owens v. Local No. 169, Association of Western Pulp & Paper Workers* to determine how free Moody had been when not actively performing his duties. As the superior court's factual findings were not challenged, the supreme court held that the lower court had appropriately applied the facts to the tests delineated in *Hutka* and *Owens*. Affirming, the supreme court held that whether time not spent actively performing duties should be counted towards overtime under the AWA is determined by applying the standard of *Hutka*.

⁸⁸ 433 P.3d 1137 (Alaska 2018).

Public Safety Employees Ass’n, AFSCME Local 803, AFL-CIO v. City of Fairbanks

In *Public Safety Employees Ass’n, AFSCME Local 803, AFL-CIO v. City of Fairbanks*,⁸⁹ the supreme court held that a city council’s politically motivated rejection of a collective bargaining agreement is not a violation of Alaska’s Public Employer Relations Act (the Act). In 2013, the City of Fairbanks began negotiating a new collective bargaining agreement with the Public Safety Employees Association (PSEA). The mayor negotiated an agreement which received tentative approval by the city council. In August 2014, after public input, the agreement was formally passed, but a council member filed a notice of reconsideration. The notice was initially rejected as untimely, but at the next council meeting the rules were suspended to allow for reconsideration. After reconsideration, where a number of constituents voiced concerns about the city’s ability to pay, the council unanimously rejected the agreement. PSEA filed a charge with the Alaska Labor Relations Agency (ALRA), alleging that the council had not bargained in good faith. The union further argued that the suspension of the rules and reconsideration of the agreement was an unfair labor practice. An ALRA panel found that the council had acted in bad faith by “stringing out” negotiations, and a superior court affirmed this result. On appeal, the supreme court reasoned the council had acted within its procedures to reconsider and ultimately reject the agreement. Further, the supreme court concluded that there was no evidence of intent to “string out” negotiations in bad faith. The court reached this conclusion based on four considerations: 1) the council’s directives in the bargaining process were tentative, 2) the council was unaware of higher cost estimates when it tentatively approved parts of the agreement, 3) there was no evidence the council voted to reconsider based on any consideration other than finances, and 4) there was no evidence the council postponed for any reason other than reassessment. The supreme court found that the council voted to reject the agreement based on the political process alone; the court explained that without more this does not evidence a lack of “present intention to find a basis for agreement,” and therefore no violation of the Act occurred. Reversing the superior court’s decision in favor of PSEA, the supreme court held that a city council’s politically motivated rejection of a collective bargaining agreement is not a violation of Alaska’s Public Employer Relations Act.

Sleeper v. URS Midwest

In *Sleeper v. URS Midwest*,⁹⁰ the district court held that the Alaska Wage and Hour Act (AWHA) is not preempted by the Fair Labor Standards Act (FLSA). Sleeper was employed by URS as a truck driver. Sleeper claimed that during his employment, URS failed to pay him overtime and illegally deducted pay he earned. As part of their defense, URS asserted that Sleeper’s claim under the state law AWHHA was preempted by the federal law FLSA. Rejecting this claim, the district court explained that they were bound by Ninth Circuit precedent holding otherwise. The court reasoned that creating an exception to the Ninth Circuit’s holding was unwarranted because the record keeping requirements of the AWHHA are not inconsistent, and therefore not preempted, by a federal statute which serves the purpose of promoting highway safety. Finally, the court reasoned that no other provision of the AWHHA was in direct conflict with the FLSA or otherwise an obstacle to Congressional intent. Consequently, the district court held that the AWHHA is not preempted by the FLSA.

⁸⁹ 420 P.3d 1243 (Alaska 2018).

⁹⁰ 347 F. Supp. 3d 408 (D. Alaska 2018).

ENVIRONMENTAL LAW

League of Conservation Voters v. Trump

In *League of Conservation Voters v. Trump*,⁹¹ the district court held that the potential harm to the oceans from an executive order was sufficiently imminent, geographically specific, and particularized to establish standing under Article III. Using power granted by Congress in the Outer Continental Shelf Lands Act (“OCSLA”), President Obama withdrew 128 million acres of the Arctic and Atlantic Oceans from future oil and gas leasing over the course of 2015 and 2016. In April 2017, President Trump issued an executive order reversing these decisions. The League of Conservation Voters, and others, sued the President and members of his administration, claiming they lacked statutory authority to reverse the withdrawal. The Defendants moved to dismiss on grounds of sovereign immunity, the Plaintiffs’ lack of a private right of action, the inability of the court to issue declaratory relief against the President, and the Plaintiffs’ lack of Article III standing. The district court rejected all grounds for dismissal, focusing particularly on the question of standing under Article III. It rejected the sovereign immunity argument on the basis of precedential exceptions for officers unconstitutional actions taken in the sovereign’s name or in excess of statutory authority. It also rejected the need for a statutorily authorized cause of action because Plaintiffs’ suit challenged action in excess of the President’s constitutional or statutory authority rather than for enforcement of a federal law. The district court sidestepped the questionable constitutionality of an injunction against the president on the grounds that the Plaintiffs ultimately sought an injunction against subordinate officials, not the President. With respect to Article III standing, the district court concluded that the Plaintiffs were able to demonstrate injury in fact by establishing imminent harm, geographic specificity of the threat, and particularity of harm. It determined that the alleged threat of harm to ocean wildlife from seismic research was imminent based on the government’s clear intent to expedite energy production and the oil industry’s eagerness to pursue this production. Despite the large area covered by the suit, because it was discrete and defined, the court concluded the threat was geographically specific. And Plaintiffs’ loss of enjoyment of the wildlife in these areas established the particularity of harm. In rejecting the motions to dismiss, the district court held that the potential harm to the oceans was sufficiently imminent, geographically specific, and particularized to establish standing under Article III and allowed the lawsuit to proceed.

⁹¹ 303 F.Supp.3d 985 (D. Alaska 2018).

EVIDENCE LAW

Wassillie v. State

In *Wassillie v. State*,⁹² the supreme court held that an incident report prepared by a staff member at a halfway house was inadmissible under the business records exception to the hearsay rule. Wassillie, who was serving out the remainder of a felony sentence at the Parkview Center halfway house, was found guilty of second-degree escape. His indictment was based on an incident report prepared by a staff member that relayed the statements of another resident. Wassillie appealed, arguing that the incident report was inadmissible hearsay, and without it the evidence was insufficient to support his indictment. The state argued that the incident report was admissible under the business records exception to the hearsay rule. The Supreme Court concluded that the incident report was not admissible under the business records exception to the hearsay rule. Business records are exempt from the hearsay rule because they typically reflect the routine operations of a business. To qualify for this exemption, the record must be of a regularly conducted business activity, must be regularly kept, the source must have personal knowledge, the information must have been recorded contemporaneously, and foundation testimony must be provided. The court found that this incident report was not prepared as part of a regularly conducted business activity and was prepared in anticipation of litigation, undermining its trustworthiness. The court analogized this incident report to investigative reports prepared by a participant or observer to an incident, such as a police report, which are less objective and are ordinarily inadmissible. Thus, the Supreme Court reversed and held that the incident report was inadmissible under the business records exception.

⁹² 411 P.3d 595 (Alaska 2018).

FAMILY LAW

Brennan v. Brennan

In *Brennan v. Brennan*,⁹³ the Supreme Court of Alaska held that to determine whether separate property has been transmuted into marital property through an implied inter-spousal gift, a court must determine whether the owning spouse intended “to donate or convey separate property to the marital unit or marital estate.” Kelly Brennan formed a fishing business with his first wife Mary. Through his work, he acquired Individual Fishing Quotas (IFQs) from the federal government to harvest halibut and sablefish. Following Kelly’s divorce from Mary, he married Rachael in July 1994. Kelly and Rachael filed for divorce in May 2012, and the two disputed their contributions to the fishing business. Supposedly, Kelly fished and maintained the vessel, while Rachael ran errands for the business, cleaned the boat, and engaged in bookkeeping for almost 20 years. The superior court found that the IFQs were all acquired through work performed before Kelly married Rachael, so they constituted separate property when Kelly entered into the marriage. However, considering that Kelly made payments for the IFQs to his ex-wife Mary using marital income from the business and sold several IFQs to pay for his marital home with Rachael, the superior court found that after the marriage Kelly and Rachael had together transmuted the IFQs into marital property by exhibiting “intent” to treat them as such. Kelly appealed challenging both the superior court’s finding of facts and its application of law on this issue. The Supreme Court of Alaska found that the payments to Mary and toward the marital home were irrelevant and held that only the owning spouse’s intent is relevant to determining whether a transmutation has occurred through an implied inter-spousal gift. The Court explained that in order to consider the non-owning spouse’s intent, “the non-owning spouse’s participating must be significant and evidence an intent to operate jointly.” The court concluded that though the superior court found that Rachael had such an intent, and had made a “significant” contribution, the court failed to analyze whether Kelly, the separate owner, had such an intent to operate the business jointly. Reversing and remanding for reconsideration of the issue, the Supreme Court of Alaska held that in order to determine whether separate property may “transmute” into marital property through an implied inter-spousal gift, the court must determine whether the owning spouse intended “to donate or convey separate property to the marital unit or marital estate.”

Dara S. v. State

In *Dara S. v. State*,⁹⁴ the supreme court held that a court may set aside a termination of parental rights order where there is clear and convincing evidence both that the parent is sufficiently rehabilitated and that the parent is capable of providing the care and guidance that will serve the moral, emotional, mental and physical welfare of the child. Paxton, son of Dara S., was born with serious kidney problems requiring extensive medical care. Shortly after her son’s birth, Dara sought mental health counseling for depression, and was subsequently diagnosed with various mental health disorders requiring medication. The Office of Children’s Services (OCS) filed for emergency custody of Paxton after Dara was hospitalized for a possible suicide attempt and later diagnosed with psychosis brought on by her medications. Over the next couple of years, Dara underwent treatment and worked toward regaining custody of Paxton. Two and a half years after the emergency removal, OCS’s petition to terminate Dara’s parental rights was granted. After the

⁹³ 425 P.3d 99 (Alaska 2018).

⁹⁴ 426 P.3d 975 (Alaska 2018).

oral termination decision but prior to the written termination order, Dara moved for a review hearing. Following the review hearing, the judge reinstated Dara's parental rights, which OSC appealed. The supreme court affirmed the superior court's termination order, holding that the lower court's findings were not clearly erroneous, and that all the necessary findings required for the termination of parental rights were made. The court then affirmed the validity of relevant caselaw, including *Rita T. v. State*,⁹⁵ which established a limited opportunity to reinstate parental rights post-termination.⁹⁶ The court concluded that although statutory law was amended since the *Rita T.* decision, the replacement of "review hearings" with "permanency hearings" did not prevent parents from applying, with good cause shown, for a hearing regarding disposition orders, as was done under the previous law.⁹⁷ The court rejected the argument that *Rita T.* hearings do not have a statutory basis, holding that such hearings fit within the statutory framework allowing courts to stay, grant a new hearing, modify, or set aside any order or judgment entered in a Child In Need of Aid matter. Finally, the court determined that in a *Rita T.* hearing, a parent must show by clear and convincing evidence that reinstatement is in the best interests of the child and that the parent "is rehabilitated and [] is currently capable of providing the care and guidance that will serve the moral, emotional, mental and physical welfare of the child." Concluding that it lacked a sufficient record to determine Paxton's best interests, the court affirmed the initial termination of Dara's parental rights and remanded for further findings holding that that a court may set aside a termination of parental rights order where there is clear and convincing evidence both that the parent is sufficiently rehabilitated and that the parent is capable of providing the care and guidance that will serve the moral, emotional, mental and physical welfare of the child.

Dean S. v. State Dep't of Health & Social Services

In *Dean S. v. State Dep't of Health & Social Services*,⁹⁸ the supreme court held that a superior court's procedurally proper denial of a motion to withdraw consent to adoption will not be overturned absent clear error established by a "definite impression" of factual error in the record. Dean and Emily S. were investigated by the Office of Children's Services ("OCS") over a seven-year period for mostly unsubstantiated claims of substance abuse and neglect; OCS took custody over their children twice in that period. Ultimately, OCS sought termination of their parental rights, and both parents executed valid consents to adoption by Dean's sister. Dean subsequently moved to withdraw his consent, claiming a desire for full custody and arguing that he had worked to improve himself as a parent. Applying the best interests of the child standard, the superior court denied Dean's motion, relying on the OCS caseworker's testimony that the children were thriving in Dean's sister's custody. The supreme court held that where the record does not show a clear factual error by the superior court, the superior court's decision to deny a motion for withdrawal of consent to adoption will not be overturned. The supreme court explained that ten days after consent to adoption is given, section 25.23.070 of the Alaska Statutes only allows it to be withdrawn if doing so is in the best interest of the child as determined by a hearing including the petitioner, the person seeking withdrawal, and the agency placing the child up for adoption. The supreme court determined that the record did not give a "definite impression" that the superior court's conclusion was in error as Dean's testimony could be understood to say that withdrawing

⁹⁵ 623 P.2d 344 (Alaska 1981).

⁹⁶ 426 P.3d at 992.

⁹⁷ *Id.* at 996—97.

⁹⁸ 420 P.3d 1175 (Alaska 2018).

consent was in his best interest, not the children's. Affirming the superior court, the supreme court held that a superior court decision to deny a motion to withdraw consent to adoption will not be overturned absent clear error established by a "definite impression" of factual error in the record.

Diego K. v. State Dep't of Health & Social Services

In *Diego K. v. State Dep't of Health & Social Services*,⁹⁹ the supreme court held that, when a court is making factual findings and legal conclusions in a child in need of aid (CINA) hearing, it is error to rely upon substantial information not in evidence. Between March 2014 and April 2016, a series of status and removal hearings were held regarding a teenager named Mary, who was an Indian child as defined by the Indian Child's Welfare Act (ICWA). During these hearings, testimony was offered regarding Mary's living conditions, family affairs, school attendance, and behavioral issues. Based on this information, the superior court ordered Mary to be removed from her parents' custody. On appeal, the parents argued that it was reversible error for the superior court to consider unsworn statements due to the requirements of CINA Rule 3(h) and Alaska Evidence Rule 603. The supreme court agreed, reasoning that child custody cases such as Mary's involve issues of fundamental importance which deserve great care. The court further reasoned that the parents' lacked notice and opportunity to be heard, as they were denied the opportunity to object to the unsworn statements. Remanding the superior court's decision, the supreme court held that, when a court is making factual findings and legal conclusions in a CINA hearing, it is error to rely upon substantial information not in evidence.

Dunmore v. Dunmore

In *Dunmore v. Dunmore*¹⁰⁰, the Supreme Court of Alaska held that while a court cannot lawfully divide social security benefits belonging to either spouse, courts have discretion to consider them as evidence of the parties' respective financial positions when equitably dividing marital property. Gloria and Richard Dunmore were married in 1975, separated in July 2007, and Richard filed for divorce in July of 2015. At the time of the trial to divide their property, Richard was nearly 64 and Gloria was 61. Richard received Veterans Administration (VA) disability benefits of \$133 per month, Social Security disability benefits of \$2,081 per month, and a Federal Employees Retirement System (FERS) pension of approximately \$360 per month. Gloria received \$5,762 in monthly benefits from the Public Employees Retirement System (PERS). The superior court equally divided the parties' pensions and the benefits from the FERS and PERS plans for the dates between their marriage and separation. The superior court noted that it had not considered the parties' Social Security and VA benefits in making the equal division because caselaw prohibited it from dividing these benefits between the parties. It explained that this result unfairly favored Richard and it encouraged Gloria to appeal. The supreme court reversed, reasoning that though courts may not offset Social Security benefits with a larger award of marital property, a court may consider such benefits as one of several factors relevant to assessing the financial positions of each party because such assessment is necessary to making fair allocation of the marital estate. Vacating the superior court, and remanding for further consideration, the supreme court held that while a court cannot lawfully divide social security benefits belonging to either spouse, courts have discretion to consider them as evidence of the parties' respective financial positions when equitably dividing marital property.

⁹⁹ 411 P.3d 622 (Alaska 2018).

¹⁰⁰ 420 P.3d 1187 (Alaska 2018).

Edith A. v. Jonah A.

In *Edith A. v. Jonah A.*,¹⁰¹ the Supreme Court held that a party is entitled to a hearing on a motion to modify legal custody if she has alleged specific facts which, if true, demonstrate a substantial change in circumstances. Jonah and Edith were married in 2006 and had a son. Jonah filed for divorce in 2008, and the two came to an agreement for joint legal custody. In April 2015 Edith filed a motion to modify custody to obtain sole legal and primary physical custody. The superior court denied the motion, though it found the parties were “remarkably unkind” and ordered them to minimize contact for the benefit of the child. In July 2017, Edith filed a second motion once again seeking to give herself sole custody. She credibly alleged that the current arrangement was unworkable because Jonah failed to cooperate in getting the child to therapy, selecting a school, and in ensuring adequate medical care. The superior court denied the second motion to modify custody without a hearing, finding no credible argument that there has been a material change of circumstances from the prior hearing. The supreme court disagreed. It found that Edith’s allegations, if true represented a material change of circumstances. The court explained that joint legal custody is not appropriate if parents are unable to cooperate in a child’s best interest. Consequently, the court reasoned that a failure to cooperate can of justify a change in the custody arrangement. The court concluded that Jonah’s alleged unwillingness to cooperate met this standard and so a hearing was required. Reversing and remanding, the Supreme Court held that a party is entitled to a hearing on a motion to modify legal custody if she has alleged specific facts which, if true, demonstrate a substantial change in circumstances.

Farr v. Little

In *Farr v. Little*,¹⁰² the Supreme Court held that when a superior court uses its discretion to impute income to a parent for child support purposes, it must set forth its factual findings and explanation for the imputed income. Little was awarded custody of her and Farr’s children and filed a motion for child support. Questions were raised about Farr’s ability to work stemming from an injury sustained while serving in the Air Force. However, Farr claimed that he had received several offers from Boeing for positions paying six-figure salaries. Little also stated in her affidavit and brought up in her closing argument that Farr had been working for free as an HVAC mechanic. The trial court found that Farr had the ability to earn \$40,000 annually for child support purposes. Little did not participate in the appeal, but Farr argues that a lack of evidence exists to support the \$40,000 figure. The supreme court agreed, reasoning that a court’s determination of imputed income must be supported by specific findings based on work history, qualifications, and job opportunities, and the calculations supporting such finding must also be disclosed. It found no evidence existed of Farr’s ability to work as an HVAC mechanic, or his ability to work for Boeing, and it determined that the lower court failed to describe how it arrived at the \$40,000 estimate. Reversing the lower court’s decision, the Supreme Court held that when a superior court uses its discretion to impute income to a parent for child support purposes, it must set forth its factual findings and explanation for the imputed income.

¹⁰¹ 433 P.3d 1157 (Alaska 2018).

¹⁰² 411 P.3d 630 (Alaska 2018).

Fletcher v. Fletcher

In *Fletcher v. Fletcher*,¹⁰³ the supreme court held that the trial court's findings regarding the division of marital property should have been sufficient to overcome the presumption of an equal distribution of the property, and therefore the equal division was an abuse of the lower court's discretion. Married since 1990, Linda Fletcher filed for divorce from her husband David in 2014. The marital house was purchased in Linda's name, and the loan was taken out under her name, but David had made substantial improvements. In 2010 David moved out of the house and began living out of his truck. In 2015, he still resided there, though he indicated that he would soon have the opportunity to begin living at a friend's house for \$600 per month. At the time David was 62, ten years older than Linda, and in poor health. He had previously been diagnosed with type II diabetes, and subsequently suffered two heart attacks (the first of which required surgery), and later a stroke. David indicated that he would qualify for Medicare in 2017, but until then he would have to pay for medical care, and he had had few assets: his social security disability, \$1,200 in savings, and two small pension accounts. In contrast, Linda was in better health, employed and covered by her employer's health insurance plan, had \$6,000 in savings, and had two retirement accounts valued at approximately \$87,000 and \$178,000. The superior court considered the property division factors under AS 25.24.160(a)(4) and made relevant findings, determining that the presumption of an equal division of the property was not overcome. The court awarded Linda the marital home while ordering that she make an equalization payment of approximately \$72,000 to David. Both parties appealed, the supreme court reversed. The court explained that in determining an equitable division of marital property, the starting presumption is that the most just outcome is achieved by an equal division. However, the court noted that the presumption may be overcome if, after considering the *Merrill v. Merrill*¹⁰⁴ factors codified in section 25.24.160(a)(4) of the Alaska Statutes, a court finds an unequal division to be more equitable.¹⁰⁵ The court elaborated that these factors are not exhaustive and that trial courts need not make a finding as to each factor. However, the court concluded that the findings must be sufficient to establish a factual basis supporting the trial court's conclusion. Analogizing to precedent where the supreme court had vacated property divisions due to a court's failure to consider parties' health expenses in conjunction with their reduced income, the court found that the equities weighed heavily in David's favor consider his age, health, and income disparity. The court concluded that a small post-division payment did not justify the equal division of the marital estate. Reversing and remanding on the issue, the court held that, based on the superior court's findings, the property division was clearly unjust and therefore an abuse of the superior court's discretion in dividing the marital estate.

Fox v. Grace

In *Fox v. Grace*,¹⁰⁶ the supreme court held that an Alaskan court can modify an out-of-state custody order if it determines that the child, the parent, and all persons acting as parents live outside the issuing state. In early 2018, the Graces filed motions in an Oregon court to modify their custody arrangement with Fox, the father of their grandchildren, and to hold Fox in contempt for missed visitation. The court did not modify custody, but did add alternative visitation days to make up

¹⁰³ 433 P.3d 1148 (Alaska 2018).

¹⁰⁴ 368 P.2d 546 (Alaska 1962).

¹⁰⁵ 433 P.3d at 1154.

¹⁰⁶ No. S-16996, 2018 WL 6817305 (Alaska Dec. 28, 2018).

for those missed. Fox responded by filing a motion in an Alaskan superior court to modify the Oregon court's visitation order and terminate the Graces' mandatory visitation rights. The superior court held that it did not have subject matter jurisdiction under section 25.30.320 of the Alaska Statutes to modify the order unless Oregon released jurisdiction. Fox appealed. The supreme court held that according to section 25.30.320 of the Alaska Statutes, an Alaska court can modify an out-of-state custody order if that court has released its jurisdiction or if neither the child, a parent, or a person acting as a parent resides in the state whose courts issued the order. The court explained that a court must consider both sources of jurisdiction under the statute before it finds that it lacks it. It noted that while the superior court correctly recognized that the Oregon court had not given up jurisdiction, the superior court had failed to consider section 25.30.320(2). The court continued, concluding that the Oregon court's finding that the Graces had a child-parent relationship with the children was not dispositive as that finding did not make them a person acting as a parent under Alaska law. The supreme court vacated the superior court's order and remanded the case for further consideration, holding that if neither the child, a parent, or someone acting as a parent resides in the state whose courts gave a custody order, then an Alaska court may modify that state's custody order.

Geldermann v. Geldermann

In *Geldermann v. Geldermann*,¹⁰⁷ the supreme court held that a superior court may *sua sponte* modify child support and custody agreements without a formal motion on the matter so long as both parties have sufficient opportunity to be heard and actual notice that modification may be at issue. After divorcing in 2011, Darcey and Matthew Geldermann agreed that their son would live primarily with Darcey during the school year. In 2014, in response to a series of behavioral issues, both parents agreed to have Matthew, who had since settled in California, temporarily take over primary parenting during the school year, though they did not file this agreement with the court. In late 2015, the arrangement fell apart, and both filed custody actions—Darcey in Alaska seeking to enforce the 2011 agreement and Matthew in California seeking a transfer of jurisdiction and codification of the informal 2014 agreement. The courts conferred and ultimately decided to keep jurisdiction in Alaska. Although Matthew did not file a motion in Alaska to modify the 2011 agreement, the superior court denied Darcey's motion and awarded Matthew primary physical custody; Darcey appealed. The supreme court held that the superior court has authority to decide both custody issues *sua sponte* and to retroactively modify child support arrangements after the initial filing for modification of custody. The supreme court explained that as long as a party has raised the issue of custody, and both sides are sufficiently informed going in that there is a possible custody modification forthcoming, due process requirements are satisfied even if the court initiates the modification of custody arrangements on its own. The supreme court also held that changes in child support can be made effective without violating Alaska's retroactive modification bar any time after a petition to modify custody is filed as long as both parties have sufficient notice, overruling its previous decision in *Millette v. Millette* that no change could be dated before an actual motion to modify child support. The supreme court affirmed, holding that a superior court may *sua sponte* modify child support and custody agreements without a formal motion on the matter so long as both parties have sufficient opportunity to be heard and actual notice that modification may be at issue.

¹⁰⁷ 428 P.3d 477 (Alaska 2018).

Holmes v. Holmes

In *Holmes v. Holmes*,¹⁰⁸ the supreme court held that a two-week change in custody time by a parent, and a change in a parent's salary and employment status, constitute material changes which justify a court's decision to modify a child support order. Branlund Holmes and Tamara Holmes shared custody of their two minor children. The superior court averaged the total amount of time that the children spent with each parent for purposes of determining which had primary physical custody. Branlund alleged that the superior court had also, in a prior year, allowed him to deduct his travel expenses when calculating his income for child support purposes. The superior court modified these orders awarding Tamara primary custody based on a two week change in the children's summer vacation schedule, and denying Branlund the ability to deduct travel expenses based on a change in his income and employment status. On appeal, Branlund argued that neither of these circumstances constituted a material change sufficient to allow modification to the child support order. The supreme court disagreed, reasoning that the diminished time Branlund spent with his children as a result of the change in summer vacation was material to his custody determination. The supreme court further reasoned that Branlund's salary decrease and change in the fact that he no longer earned money from self-employment were material facts relating to the issue of travel expenses and so allowed the court to modify how Branlund's child support payments were calculated. Affirming the superior court's decision, the supreme court held that a two-week change in custody time by one parent, and a change in a parent's salary and employment status, constitute material changes which justify a court's decision to modify a child support order.

In re the Adoption of E.H. and J.H.

In *re the Adoption of E.H. and J.H.*¹⁰⁹ the supreme court held that an adoption decree is voidable when based on material misrepresentation. Two young siblings, Simon and Ellie,¹¹⁰ were removed from their parents' home and placed with a foster family, but maintained a relationship with their maternal grandparents. While Simon and Ellie lived with the foster family, the grandparents and foster family often disagreed. After about two years, the state terminated the children's parents' parental rights. Both the foster family and grandparents sought to adopt the children. The grandparents withdrew their request to adopt in exchange for an agreement with the foster family that incorporated visitation rights. Soon after the adoption became official, the foster family violated the terms of agreement by refusing to allow the grandparents to see Simon and Ellie. The grandparents moved to reopen the adoption case; following an evidentiary hearing, the superior court vacated the adoption. The foster family appealed. The foster family argued that enforcement of the agreement, rather than vacating the adoption was the grandparents' only available remedy. The supreme court held that a fraudulent or material misrepresentation can be grounds for vacating an adoption if the misrepresentation induces the consent of a party necessary to the adoption, or causes assent to a settlement agreement incorporated in the adoption decree. Because the foster family did not dispute the fact that they had no intention of abiding by the terms of the settlement, the supreme court upheld the superior court's decision to vacate the adoption. The court found that the foster family's misrepresentation and their conduct undermining the relationship terms in the agreement invalidated the grandparents' assent. Affirming the superior court's decision, the

¹⁰⁸ 414 P.3d 662 (Alaska 2018).

¹⁰⁹ 431 P.3d 1190 (Alaska 2018).

¹¹⁰ Pseudonyms assigned by the court

supreme court held that a material misrepresentation used to obtain consent to an adoption, or to a settlement agreement incorporated into an adoption decree, is grounds for vacating that adoption.

Jensen D. v. State Dep't of Health & Social Services

In *Jensen D. v. State, Dep't of Health and Social Services*,¹¹¹ the supreme court held that it is not an abuse of discretion to deny a request for self-representation at a parental custody termination trial where the parent is either (1) incapable of presenting allegations in a rational and coherent manner, (2) unable to understand what they are giving up by declining counsel, or (3) unwilling to conduct herself with a modicum of courtroom decorum. Jensen D. was the mother of a seven-year-old child who had been in the custody of the Office of Children's Services (OCS) since 2016 as a result of Jensen's struggles with substance abuse and mental health. During proceedings where OCS petitioned to terminate her parental rights, Jensen requested a different attorney, which was denied in part because she seemed to be exhibiting the effects of methamphetamine. During the termination trial, she appeared again to be under the influence of methamphetamine and was denied a request to represent herself after she claimed her lawyer was not doing an effective enough job. The superior court ultimately terminated her parental rights, and Jensen appealed the denial of her request to represent herself. The supreme court held that although self-representation is an established right, it is not absolute, and the superior court does not abuse its discretion in denying a parent's request for self-representation at a termination trial where the parent does not satisfy all parts of the three-pronged test. Based on Jensen's suspected drug abuse during the proceedings and her inability to remain quiet during other witnesses' testimony the Court determined that it was not an abuse of discretion for the superior court to find Jensen had violated the third prong of the test. The supreme court affirmed, holding that it is not an abuse of discretion to deny a request for self-representation at a termination trial where the parent is either (1) incapable of presenting allegations in a rational and coherent manner, (2) unable to understand what they are giving up by declining counsel, or (3) unwilling to conduct herself with a modicum of courtroom decorum.

Kailyn S. v. Alaska Dep't of Health & Social Services

In *Kailyn S. v Alaska Dep't of Health & Social Services*,¹¹² the supreme court held that it is not an abuse of discretion to deny a motion for a continuance in a termination of parental rights hearing when the motion is only supported by a speculative assertion that it is necessary. Kailyn, a mother, filed for a continuance five days before her termination of parental rights hearing in a Child in Need of Aid (CINA) case. Kailyn argued that the continuance was necessary because she had been offered a job on a fishing vessel that was scheduled to leave immediately, and because she needed more time to speak with her attorney, so the attorney could provide effective assistance. The superior court denied her motion, and at the subsequent hearing terminated Kailyn's parental rights for two of her children. Kailyn appealed arguing the superior court had abused its discretion. On appeal, the supreme court emphasized the broad discretion exercised by the superior court when granting or denying a continuance. It noted that Kailyn failed to explain how she would receive more effective legal assistance should the continuance have been granted, that her motion was not supported by evidence, and that she had not proposed a definite length for the continuance. The supreme court explained that a court's decision to deny a continuance is reviewed for abuse of discretion, and that because CINA cases are time-sensitive it was reasonable for the superior court

¹¹¹ 424 P.3d 385 (Alaska 2018).

¹¹² 420 P.3d 1232 (Alaska 2018).

to prioritize the children's interest in permanency over granting a request for a continuance supported only by speculation. Affirming the superior court, the supreme court held denying a motion for a continuance in a termination of parental rights hearing is not an abuse of discretion when the motion is only supported by a speculative assertion that it is necessary for effective legal assistance.

Kessler v. Kessler

In *Kessler v. Kessler*,¹¹³ the supreme court held the mere use of separate property for marital purposes, without a donative intent, does not transform separate property into marital property. In 2010, Kenneth Kessler and Dianna Kessler were married; Dianna filed for divorce in 2015. Prior to their marriage, in 1999, Kenneth bought a condominium. The couple began living in it in 2000 and continued living there for the majority of their marriage. During the divorce proceeding, the superior court found that the condominium, which was originally Kenneth's separate property, had transmuted into marital property. That court reasoned that a change from separate property (property acquired before the marriage) to marital property (property acquired during the marriage) had occurred because the couple used the condominium as their marital home, Dianna contributed to the management and maintenance of the property, and Kenneth would not have been able to afford the condominium without Dianna's financial contributions in other areas of their marriage. The supreme court reversed the superior court's decision, reasoning a donative intent must be present for property brought into a marriage as separate property to change into marital property. In the supreme court's view, Kenneth never demonstrated that he desired to treat the condominium as marital property, as Kenneth and Dianna did not both maintain and manage the property, Kenneth was the sole title-holder of the property, and he did not present the property as a gift to Dianna. Reversing the lower courts decision, the supreme court held the mere use of separate property for marital purposes, without a donative intent, does not transform separate property into marital property.

Laura B. v. Wade B.

In *Laura B. v. Wade B.*,¹¹⁴ the Supreme Court of Alaska held that substantially modifying a custody agreement without holding a hearing to address the child's best interests violates procedural due process. Laura and Wade share legal custody and physical custody of their 17-year-old daughter. In April of 2017, Wade moved for full custody. After an initial hearing, the superior court determined that there had been a substantial change in circumstances from the initial agreement, but it left the issue of the child's best interests and the ultimate custody disposition unresolved, instead directing further investigation. After the investigation, but without further hearing, the superior court granted Wade's motion. Laura appealed arguing that her due process rights were violated by the failure to hold a second hearing. The supreme court overturned the custody modification, explaining that a further hearing was required to comply with procedural due process. The court stated that when making a material and substantial modification to a custody agreement due process requires a hearing to make a findings on two issues. First, whether a substantial change in circumstances has taken place since the initial agreement; and second, if so, whether modification is in the best interests of the child. The court concluded that Laura was denied due process because the initial hearing only determined that there was a substantial change

¹¹³ 411 P.3d 616 (Alaska 2018)

¹¹⁴ 424 P.3d 315 (Alaska 2018).

in circumstances. It elaborated that at such a hearing she could have presented evidence that despite the change in circumstances it was in their daughters' best interest that Laura retain custody, and Laura could have also rebutted the findings of the investigation. Thus, the supreme court vacated and remanded the superior court's decision, holding that in order to comport with the Alaska Constitution's procedural due process requirements, a hearing that substantially modifies a custody agreement must address both whether a substantial change in circumstances has taken place and whether an alteration is in the best interests of the child.

Maxwell v. Sosnowski

In *Maxwell v. Sosnowski*,¹¹⁵ the supreme court held that a court may only award credit for post-separation mortgage payments for those payments made after the date of separation. Jill Maxwell and William Sosnowski permanently separated on May 31, 2013, and were later divorced. During their marriage, they had purchased a triplex in Anchorage together. Sosnowski sought credit for \$134,041.02 in mortgage payments that he had made from October 2011 to April 2016. The superior court granted Sosnowski this credit in a disbursement order. On appeal, Maxwell argued that the disbursement order was inconsistent with the superior court's finding that she and Sosnowski had separated on May 31, 2013. The supreme court agreed, reasoning that the separation date was not contested, and that Alaskan case law only allows for credits to be granted for payments made from post-separation income. It explained that any payments made before the legal separation were made with marital funds and so could not be credited. Vacating the disbursement order, the supreme court held that a court may only award credit for post-separation mortgage payments for those payments made after the date of separation.

Mengisteab v. Oates

In *Mengisteab v. Oates*,¹¹⁶ the supreme court held that, in deciding child custody when a parent decides to physically relocate, a court must consider the effect the move may have on stability and continuity in a child's life. Mengisteab and Oates were the separated mother and father of a young child. Mengisteab had primary custody of the child, and Oates had visitation rights. Both parents resided in Alaska until Mengisteab abruptly relocated to Washington without informing the court or Oates. The lower court found that Mengisteab's motivation for moving was to make visitation more difficult, and it ordered that the child be returned to Alaska or Mengisteab would lose primary custody. On appeal, Mengisteab argued that the lower court failed to consider the potential consequences to the child from separation should Mengisteab choose to remain in Washington. The supreme court agreed, reasoning that in the parent relocation context a lower court must explicitly discuss whether it would be in the best interest of the child to go with the moving parent or stay with the remaining parent. Reversing the lower court's decision, the supreme court held that, in deciding child custody when a parent decides to physically relocate, a court must consider the effect the move may have on stability and continuity in a child's life.

Michael W. v. Brown

In *Michael W. v. Brown*,¹¹⁷ the supreme court held that that while section 13.26.132 of the Alaska statutes allows for parental rights to be "suspended by circumstances," that phrase focuses on

¹¹⁵ 420 P.3d 1227 (Alaska 2018).

¹¹⁶ 425 P.3d 80 (Alaska 2018).

¹¹⁷ 433 P.3d 1105 (Alaska 2018).

parents' ability to assume the responsibilities of parenthood, that custody will be harmful to a child's welfare for other reasons is not alone enough to terminate custodial rights. Following his mother's admittance to an alcohol rehabilitation center, the twelve-year-old son of separated parents stayed with his grandparents in Alaska. Six months later, when the grandparents sought appointment as the child's guardians pursuant to section 13.26.132 of the Alaska Statutes, the boy's father, who lived in New York, opposed the grandparents' petition. The father appealed the superior court's ruling that the son's best interests weigh in favor of him staying with his grandparents in Alaska. On appeal, the grandparents argued that it would be emotionally and psychologically devastating for the son to leave his caretaker grandparents in Alaska to move to his father in New York. Vacating the lower court's order, the supreme court found that the father did not lose his custodial rights solely because the son might be better off with different guardians. Following the rationales of another state supreme court with an identical guardianship statute, the court reasoned that parental rights of custody can be suspended by circumstances when their conduct – broadly: abandonment, unfitness, or consent to guardianship by another – deprives them of their rights and responsibilities as parents. Because the grandparents had not proved the father's unfitness or abandonment of the son in the lower court, they had not overcome the biological-parent preference for custody rights. Vacating the lower court's order, the supreme court held that while section 13.26.132 of the Alaska statutes allows for parental rights to be "suspended by circumstances," that phrase focuses on parents' ability to assume the responsibilities of parenthood, that custody will be harmful to a child's welfare for other reasons is not alone enough to terminate custodial rights.

Miller v. Fowler

In *Miller v. Fowler*,¹¹⁸ the Supreme Court of Alaska held that summary judgment will rarely be proper when the discovery rule is used to determine the accrual date of a statute of limitations as determining that date is a fact intensive analysis. In September 2009, Miller purchased an apartment building from Fowler with a promissory note. Miller was on notice that the building had sewer line problems, but had been told that current problems were only caused by tenant misuse as underlying issues had been fixed. Despite this, the sewer continued to back-up, and in 2012 Miller learned the line had structural problems that needed correction. Fowler agreed to three separate modifications of the note to help finance the repairs, the third of which allowed Miller to defer on payments until June 2013 and to deduct \$80,000 from the balance upon completion of repairs. However, in February 2013, Fowler declared all modifications of the note "null and void," and in May began foreclosure proceedings. When Miller sued to stop the foreclosure, enforce the agreed upon modifications, and for damages, Fowler moved for summary judgment. The trial court granted Fowler's motion, concluding that Miller's claims were barred by the two-year statute of limitations as Miller's claims were based on misrepresentations from four years beforehand. The supreme court reversed. The court explained that under the discovery rule, the accrual date (the time at which the statute of limitation's begins to run) for a claimant occurs when that person has enough information to recognize a potential claim thereby prompting them to begin an inquiry; the claimant does not need to possess enough information to establish each of the elements of this potential claim. The court continued that while this date can be resolved as a question of law, it is typically an intensive question of fact. And the court further

¹¹⁸ 424 P.3d 306 (Alaska 2018).

noted that Fowler, as the movant, had the burden to show that no question of fact existed as to when the statute of limitations began to run. From this the court reasoned that because Fowler simply assumed the accrual date was the date of purchase, and offered no evidence on that point, Fowler had failed to meet this burden. Reversing the lower court's decision, the Supreme Court of Alaska held that summary judgment will rarely be proper when the discovery rule is used to determine the accrual date of a statute of limitations as determining that date is a fact intensive analysis.

Moore v. McGillis

In *Moore v. McGillis*,¹¹⁹ the supreme court held the following: (1) a “substantial” change in a custodial parent’s circumstances, which affects a child’s welfare, is necessary to warrant a modification of child custody; (2) the intervention of a child’s biological parent constitutes a change in circumstances that requires a trial court to reconsider the child’s best interest for custody purposes; and (3) an individual’s child support obligation is not relinquished merely because a child’s biological father or mother has intervened. In 2006, Moore and McGillis were married in Ketchikan, Alaska. Prior to this marriage, Moore had a son from a previous relationship. The son’s biological father had been absent since the son’s birth. In 2007, Moore and McGillis had another child, a daughter. After several years of marriage, Moore and McGillis decided to get a divorce. During the divorce proceedings, the court awarded Moore and McGillis shared legal custody of both children. McGillis received primary custody of their daughter and Moore received primary custody of her son (McGillis’s stepson). In 2013, Moore filed a motion to modify custody and child support, asking for primary custody of their daughter and sole custody of her son. As a basis for this modification request, Moore asserted that McGillis’s “chaotic” living environment and the intervention of her son’s biological father constituted a changed circumstance warranting a modification. The trial court denied Moore’s motion and terminated McGillis’s obligation to pay child support for his stepson. In regards to the daughter, the supreme court affirmed the lower court’s decision, finding that the changes in McGillis’s circumstances were not “substantial” and insufficient to warrant a modification of custody. In regard to McGillis’s stepson, the supreme court reversed and remanded the lower courts decision, holding that the intervention of a previously absent biological parent is a changed circumstance that requires the court to reassess the child’s best interest and determine custody in light of the change. Furthermore, the supreme court found McGillis had an obligation to pay child support for his stepson, as McGillis still had legal custody of the child. Affirming in part, reversing in part and remanding, the supreme court held: (1) a “substantial” change in a custodial parent’s circumstances is required to warrant a modification of child custody; (2) the intervention of a child’s biological parent constitutes a changed circumstance that requires a trial court to reconsider the child’s best interest for custody purposes; and (3) an individual’s child support obligation is not relinquished merely because a child’s biological parent has intervened.

Ruerup v. Ruerup

In *Ruerup v. Ruerup*,¹²⁰ the supreme court held that while the superior court may modify or dissolve a long-term protective order, it may not modify the factual findings on which the order is based. In January 2015, Crystal Ruerup sought a protective order against her husband, Charles,

¹¹⁹ 408 P.3d 1196 (Alaska 2018).

¹²⁰ 408 P.3d 1203 (Alaska 2018).

alleging numerous incidents of domestic violence between 2007 and 2015. The magistrate judge heard testimony from numerous friends and family members from both sides and ultimately issued a long-term protective order after finding that, by a preponderance of the evidence, Charles had committed three acts of domestic violence against Crystal. Charles filed for divorce in 2015, and, when Crystal attempted to use Charles' history of domestic violence to disfavor his ability to gain custody of their oldest child, the superior court determined that it was not bound by the magistrate's findings on domestic violence. After hearing evidence from only the Ruerups, a friend of Crystal's, and Charles's mother, the court rejected all of Crystal's allegations while still affirming the protective order (and uncontroversially amending it to allow Charles to take their son to school). The supreme court held that parties should be able to easily modify a protective order to reflect changed circumstances without carrying the risk that the underlying factual findings of domestic violence will be relitigated. The supreme court reasoned that the statutory structure allows for courts to issue subsequent orders modifying implementation provisions but leaving factual considerations untouched. The supreme court vacated the superior court order, holding that while the superior court may modify or dissolve a long-term protective order, it may not modify the factual findings on which the order is based.

Solomon v. Solomon

In *Solomon v. Solomon*¹²¹, the Supreme Court of Alaska held that a trial court must make sufficient factual findings to allow review of its legal conclusion an individual has a history of domestic violence. Terrace and Wendy Solomon married in 1999 and had four children; the two separated in 2014, and in January 2015 Wendy filed for divorce. Terrace's attorney had continuous difficulty getting in touch with his client because Terrace had been arrested and was being held by the army. As Terrace could not be contacted on the day of the trial Wendy was the only witness; she testified to violent acts Terrace allegedly committed. The parties agreed Wendy should have sole physical custody but disagreed on whether she should have sole legal custody. Though the superior court did not specify the particular facts supporting its determination, it concluded that Terrace had a history of domestic violence based on Wendy's description of multiple incidents of low-level domestic violence. This conclusion triggered a presumption that Terrace could not have any form of custody of the children that could only be rebutted if he complied with the mandates of section 25.24.150(h) of the Alaska Statutes. On this basis the court awarded sole legal custody to Wendy. Terrace appealed arguing the superior court had made insufficient findings to support its conclusion. The Supreme Court of Alaska agreed and held a "superior court must make its findings with sufficient specificity" to allow a higher court to "review both the grounds for its decision and its application of the law to the facts." The supreme court reasoned that for proper review of the trial court's decision the record needed enough specificity for the supreme court to determine whether Wendy's testimony established the elements of a domestic violence crime. The supreme court concluded the record was insufficient as it only said Terrace "went far beyond the minimum threshold of two" crimes. Vacating and remanding for further findings, the supreme court held that a trial court must make sufficient findings to allow an appellate court to review its determination that an individual has a history of domestic violence

¹²¹ 420 P. 3d 1234 (Alaska 2018).

State Dep't of Health & Social Services v. Michelle P.

In *State Dep't of Health & Social Services v. Michelle P.*,¹²² the supreme court held that a court's authority to hear and decide a Child in Need of Aid (CINA) petition derives not from a grant of custody or supervision to the Office of Children Services (OCS) but from the child's status as a child in need of aid. In October 2014, OCS took emergency custody of a six-month old Native child, Natalie, and filed an emergency CINA petition. After an adjudication hearing in March 2015, her parents stipulated in a disposition order that she was child was in need of aid due to neglect, that OCS would retain custody of her until her mother completed substance abuse treatment (her father was incarcerated), and that OCS would retain supervision for one year. OCS eventually returned Natalie to her parents, but one month later filed a motion for removal due to her mother's relapse and her father's arrest. No party responded to OCS's motion, which was supported by an affidavit from a social worker. And on that basis the lower court authorized removal by OCS. In March 2016, OCS petitioned to extend its custody of Natalie for another year. Her father filed a motion to dismiss, arguing that the disposition order had expired before OCS petitioned for extended custody. The superior court eventually granted his motion and dismissed. OCS appealed, and the father cross-appealed arguing that the superior court lacked jurisdiction once the disposition order expired. The supreme court held that a court's authority in CINA proceedings derives from the child's status as a child in need of aid rather than from the existence of a disposition order. It reasoned that a different interpretation would add a jurisdictional limit not present in the statutory text and would inconsistently require the courts ignore children's best interests. The supreme court found that the superior court erred when it granted removal based on OCS's unopposed motion and evidence to support such findings because the supporting affidavit did not include information about the social worker's expertise or findings that Natalie's return would result in serious emotional or physical damage. Thus, holding that a court's authority to hear a CINA petition derives from a child's status as a child in need of aid rather than from a grant of custody to OCS, the supreme court vacated the dismissal for lack of jurisdiction and it also vacated the removal order, remanding to determine whether OCS has grounds for custody and whether removal is necessary.

Tomal v. Anderson

In *Tomal v. Anderson*,¹²³ the supreme court held that in distributing property acquired during a domestic partnership courts must (1) determine when the partnership began and ended; (2) classify the property of that period as partnership or separate property (first according to statute or contract, and then by the partners' intent); (3) determine partnership property's market value; and (4) distribute the partnership property without reference to equity utilizing equalization payments if necessary. In 1999, Tomal bought beachfront land where he and his domestic partner Anderson restored a cabin to serve as their home with Anderson's float house docked on the beach. Tomal and Anderson each deposited their earnings into a joint account which Anderson used to pay joint expenses until July 2011, when Tomal discovered Anderson's money had been transferred into her personal account and he retaliated in kind. In 2012, Anderson informed Tomal she would not sleep in the same house as him in. For several years thereafter, she slept in the float house whenever Tomal was on the property until winter difficulties forced her moved back into the cabin. Despite this they rarely interacted, and they continued to take care of most necessities individually,

¹²² 411 P.3d 576 (Alaska 2018).

¹²³ 426 P.3d 915 (Alaska 2018).

though Tomal continued to pay for the property while Anderson managed its upkeep. In 2016, Tomal sued Anderson for misappropriation of his funds and a share of the property expenses. Anderson counterclaimed for a domestic partnership property division. The superior court found Tomal had no valid misappropriation claims, that Anderson's property maintenance was equivalent to Tomal's expenses, and that the parties had been in a domestic partnership until 2012 which required an equal division of property obtained prior to that point. The court concluded Tomal's pension, the property, and Anderson's truck were partnership property and it accordingly distributed them using equalization payments. Both Tomal and Anderson appealed. The supreme court affirmed in part and remanded in part, concluding the superior court made minor errors. Specifically, the supreme court confirmed that a court may find a domestic partnership has terminated when partners take effective steps to cease cohabitation despite continuing to reside within the same piece of property as cotenants. The court largely affirmed the superior court's findings as to the classification of property, but determined that Anderson's truck could not be partnership property, as Anderson acquired it after the partnership had terminated. Similarly, the court largely affirmed the lower court's valuation of the property, though it corrected the valuation of an excavator where the lower court had improperly ignored the only evidence of fair market value. Finally, the court affirmed that requiring Tomal to make an equalization payment to Anderson for her share of Tomal's pension was proper method of distributing the property as Tomal was left discretion on how to make the payment. Ultimately, affirming in part and remanding in part, the supreme court held that in distributing property acquired during a domestic partnership courts must (1) determine when the partnership began and ended; (2) classify the property of that period as partnership or separate property (first according to statute or contract, and then by the partners' intent); (3) determine partnership property's market value; and (4) distribute the partnership property without reference to equity utilizing equalization payments if necessary.

Vince B. v. Sarah B.

In *Vince B. v. Sarah B.*,¹²⁴ the supreme court held that the denial of an earlier petition for a protective order does not necessarily bar a court from considering the same conduct in deciding a later petition. In September 2016, Vince and Sarah divorced and began sharing custody of their two sons. They had separated 2 and ½ years before, and in April of that year Sarah had filed for a domestic violence protective order against Vince, testifying that he punched her boyfriend, made offensive hand gestures at her and on several occasions made crude comments to both of them. In response, Vince asserted that Sarah was exaggerating and expressed worry that Sarah's boyfriend was a dangerous influence on his children. The superior court believed Sarah's version of events but denied her petition concluding that Vince's conduct did not yet rise to the level of harassment, assault or stalking. However, the court put Vince on notice that another wrong move could make Sarah eligible for a domestic violence order. In late December 2016, Sarah submitted another petition for a protective order alleging that since April Vince had continued to harass her by text, email, and phone and on one occasion that he had followed her to her boyfriend's house causing her to fear that violence would reoccur. Ultimately, the superior court found stalking in the second degree and granted the domestic violence protective order. On appeal, Vince asserted that the trial court violated the doctrine of res judicata by considering accusations raised in the first petition when deciding on the second petition. The supreme court rejected his argument, affirming the

¹²⁴ 425 P.3d 55 (Alaska 2018).

superior court's decision. The court explained that the superior court's order was based on a finding of stalking, and that the statutory definition of stalking entails a course of conduct. The court elaborated that determining whether a course of conduct exists necessitates examining past conduct. Reasoning from this the supreme court concluded that in deciding whether a course of conduct exists *res judicata* does not prohibit reconsideration of prior conduct when this occurs in conjunction with consideration of new conduct. Affirming the lower court's decision, the supreme court held that the denial of an earlier petition for a protective order does not necessarily bar a court from considering the same conduct in deciding a later petition.

Wiegers v. Richards-Wiegers

In *Wiegers v. Richards-Wiegers*,¹²⁵ the supreme court reviewed the lower court's division of a marital estate and held that a court can rely on an expert witness's valuation method when recognized as valid and adequately supported by the expert's testimony. Additionally, the court held that retirement health benefits vested before marriage can be marital assets if they continue to be funded during the marriage. Amy and Charles married in 1987, separated in 2014, and finalized their divorce in 2016. During their marriage, Charles obtained shares in his company that the company valued at \$179 per share. Amy, who's retirement benefits with the Alaska Public Employees' Retirement System (PERS) had vested in 1985, continued to work, accruing 11.7 years of her 18.7 years of PERS service during the marriage. The superior court rejected the \$179 valuation of Charles' shares, adopting Amy's expert's method of valuation which put them at \$217, and it found that Amy's retirement benefits were premarital assets as they had vested before the marriage. Charles appealed, arguing that the court relied on unsupported expert testimony to reach the valuation and that it incorrectly applied *Sparks v. Sparks* to determine whether Amy's retirement benefits were marital assets. As to the valuation method, the supreme court ruled it was not clear error for the superior court to make findings using Amy's expert's valuation method because the expert's testimony provided an adequate basis for the court's valuation finding, and because the expert used a recognized valuation method. As to Amy's PERS retirement health benefits, the supreme court explained that some portion of Amy's retirement benefits were marital property. It explained that the superior court should have applied *Engstrom v. Engstrom* which held that when retirement benefits have vested before a marriage, the portion constituting marital property is equal to the fraction of the years a spouse contributed to funding the benefits during the marriage divided by the total years worked.¹²⁶ Holding that retirement benefits vested prior to marriage but funded after it may be marital property, and that a court may rely on a recognized valuation method sufficiently supported by expert testimony, the supreme court reversed the characterization of Amy's PERS benefits as non-marital, affirmed the valuation of Charles's shares, and remanded for valuation of Amy's PERS benefits.

Wyman v. Whitson

In *Wyman v. Whitson*,¹²⁷ the supreme court held that because fishing permits and quota shares are perpetual intangible assets with an indefinite useful life, an amortization of those assets is not deductible from income for child support purposes. Wyman, a self-employed commercial fisherman, owned several fishing permits and individual fishing quota shares as part of his

¹²⁵ 420 P.3d 1180 (Alaska 2018).

¹²⁶ *Id.* at 1186 (citing *Engstrom v. Engstrom*, 350 P.3d 766, 771 (Alaska 2015)).

¹²⁷ 421 P.3d 99 (Alaska 2018).

business. Each year, Wyman made a deduction on his federal income tax return for amortization of those intangible assets. Wyman argued that those deductions should also apply to his income for purposes of calculating child support, as they reflected ordinary and necessary expenses required to produce income and were no different than depreciation deductions allowed under *Eagley v. Eagley*. The supreme court disagreed, explaining that deductions are not automatically permitted for child support purposes merely because they are allowed by the IRS. The court explained that in *Eagley* and other cases, the court had permitted depreciation deductions from income for child support purposes so long as the deduction in question was demonstrated to reflect an ordinary and necessary business expense. It explained that in *Eagley* the supreme court focused on the depreciation of buildings, fixtures, and other improvements in a restaurant, which were considered equivalent to other business equipment. The supreme court elaborated that depreciation expenses are deductible because the depreciation itself represents a real, tangible, and necessary cost. While Wyman's fishing permits and quota shares were capital assets necessary to produce income, they were perpetual intangible assets. They did not expire or wear out and required no capital to preserve. Thus, the supreme court affirmed and held that because fishing permits and quota shares are perpetual intangible assets with an indefinite useful life, amortization of those assets is not deductible from income for child support purposes.

HEALTH LAW

Alaska Ass’n. of Naturopathic Physicians v. State Dep’t of Commerce

In *Alaska Ass’n. of Naturopathic Physicians v. State Dep’t of Commerce*,¹²⁸ the supreme court held that new regulations prohibiting naturopathic physicians from using or prescribing all prescription medicines are consistent with the enabling statute. Alaska established a statutory licensing structure for naturopathy¹²⁹ in 1986, and conferred regulatory authority to the Department of Commerce in 1992.¹³⁰ In 2012, the Department amended its regulatory definitions, so that the definition of prescription drugs was expanded to include all prescription medicine and it explicitly excluded prescription drugs from the regulatory definitions of dietetics, herbal medicines, and homeopathic remedies. The effect was to prevent naturopaths from using or prescribing any prescription medicines, including injectable vitamins and minerals and herbal or homeopathic remedies. In 2014, the Alaska Association of Naturopathic Physicians sought declaratory judgment that the amended regulations were invalid to the extent that they conflicted with the enabling statute. The superior court granted summary judgment in favor of the Department. On appeal, the Association argued that the new regulatory definitions were inconsistent with the definitions of and restrictions on naturopathy in the enabling statute; in particular it argued the statute merely prohibits naturopaths from using prescription drugs as opposed to all prescription medicine. The supreme court affirmed the lower court’s decision, reasoning that the statutory text and structure do not point to a broad conferral of prescribing power upon naturopathic physicians, especially when compared to other regulated health professions. The court also found that the statute’s drafting process winnowed away at naturopaths’ prescribing power, further suggesting that the statute did not convey any prescribing authority to naturopaths. Affirming the lower court’s summary judgment in favor of the Department, the supreme court held that new regulations prohibiting naturopathic physicians from using or prescribing all prescription medicines are consistent with the enabling statute.

Harrold-Jones v. Drury

In *Harrold-Jones v. Drury*,¹³¹ the supreme court held that a defendant may only make ex parte contact with a plaintiff’s treating physicians with the plaintiff’s consent or a court order, the latter of which is to be issued only in extraordinary circumstances. In 2014, Harrold-Jones received treatment for a fractured clavicle from Dr. Drury and Dr. Pace at Denali Orthopedic Surgery. After transferring to a new facility and a third doctor, Harrold-Jones sent a draft malpractice complaint against Drury and Pace to Denali; despite several requests by Denali’s counsel that she authorize the release of her medical records, Harrold-Jones repeatedly refused. When Harrold-Jones sought a protective order to prevent Denali’s counsel from having ex parte contact with her new physician the superior court denied her request and authorized such contact on the basis of *Langdon v. Champion*. The supreme court held that although the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not preempt Alaska’s law allowing ex parte contact, it was time to overrule *Langdon* as HIPAA represented changes in the culture of medical privacy that made *Langdon* obsolete. The court explained that *Langdon* allowed ex parte contact because

¹²⁸ 414 P.3d 630 (Alaska 2018).

¹²⁹ ALASKA STAT. § 08.45 (2018).

¹³⁰ *Naturopathic Physicians*, 414 P.3d at 632.

¹³¹ 422 P.3d 568 (Alaska 2018).

at the time filing a medical malpractice suit waived physician-patient privilege. This meant that ex parte contact facilitated cost-effective discovery without infringing on expectations of privacy. Contrasting *Langdon* with HIPAA, the court noted that HIPAA represented a shift in cultural and legal barriers to discovery in a medical malpractice suits. The court explained that HIPAA's restrictions make lawful ex parte contact effectively identical to court-ordered discovery and supervision, and that this is a cumbersome process at odds with HIPAA's court order-based discovery rules. On this basis, the supreme court reasoned that it would be more in line with current views on medical privacy to limit medical discovery methods to formal procedures. Reversing and remanding for further proceedings, the supreme court held that a defendant may only contact a plaintiff's treating physicians after getting either the plaintiff's permission or a court order, the latter of which is to be issued only in extraordinary conditions.

In re Necessity for the Hospitalization of Darren M.

In the *In re Necessity for the Hospitalization of Darren M.*,¹³² the supreme court held that, under section 47.40.655 of the Alaska Statutes, to involuntarily commit someone who is gravely disabled by mental illness but not a danger to others, the state must show that commitment provides a reasonable possibility of improvement by clear and convincing evidence. Darren M. was involuntarily committed to the Alaska Psychiatric Institute (API) after a mental health evaluation prompted by his family's concerns about his mental health and safety. Darren suffers from Korsakoff syndrome¹³³ and bipolar disorder.¹³⁴ API sought to extend Darren's commitment for ninety days on the grounds that he was gravely disabled because of his mental illness. The superior court granted API's request and Darren appealed. Among other issues, Darren claimed that the superior court failed to find sufficient evidence that his commitment "would: improve with treatment as it only required the state to prove that he "could" improve. Darren contended that this lesser standard violated the governing statute. The supreme court disagreed. It noted that the statute's language only required the state allege a "reasonable expectation" of improvement with an implicit requirement that the state actually prove its allegations. The court reasoned that statutory language did not compel either standard. Ultimately, the court determined that requiring the state to prove a person "will" improve from commitment is too high burden, so the court held that the "reasonable expectation" requirement only means the state must prove a "reasonable possibility" of improvement before commitment. Additionally, noting the importance of the liberty interest in question and the severity of involuntary commitment, the court required the state to meet this burden through clear and convincing evidence. Applying this standard to the case at hand, the court found that the state's expert's testimony met the burden. Affirming the superior court's commitment order, the supreme court held that, under section 47.40.655 of the Alaska Statutes, to involuntarily commit someone who is gravely disabled by mental illness but not a danger to others, the state must show that commitment provides a reasonable possibility of improvement by clear and convincing evidence.

¹³² 426 P.3d 1021

¹³³ A condition created by chronic B₁ deficiency that causes deterioration of nerve and brain function.

¹³⁴ 426 P.3d at 1025.

In re the Necessity for the Hospitalization of Paige M.

In *In re the Necessity for the Hospitalization of Paige M.*,¹³⁵ the supreme court held that a court must conduct a post-petition screening investigation, or appoint a mental health professional to conduct one, before granting a petition for involuntary hospitalization under section 47.30.700 of the Alaska Statutes. A psychologist at a mental health clinic petitioned to have a patient involuntarily hospitalized. The superior court held a hearing on the petition at which only the psychologist gave substantive testimony. The court granted the petition, and the patient was hospitalized. The patient appealed, arguing that the trial court violated section 47.30.700 of the Alaska Statutes by not ensuring that a full screening investigation was conducted before it issued the order for her involuntary hospitalization. The supreme court agreed, explaining that three key events must occur before an individual may be involuntarily hospitalized: first, an adult must petition a superior court for the respondent's involuntary hospitalization; second, a judge or mental health professional must conduct a screening investigation to evaluate the allegations in the petition; third, the court must find probable cause that the respondent is mentally ill and that this mental illness causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. Finally, the court explained that the required screening investigation should take place after a petition has been filed, and the screening investigation should, if possible, include an interview with the respondent. Thus, the supreme court concluded that the superior court violated section 47.30.700 of the Alaska Statutes by not conducting a post-petition interview with the respondent or attempting to determine whether one would be reasonably possible. Reversing, the supreme held that a court must conduct a post-petition screening investigation, or appoint a mental health professional to conduct one, before granting a petition for involuntary hospitalization.

Kiva O. v. State Dep't of Health & Social Services

In *Kiva O. v. State Dep't of Health & Social Services*,¹³⁶ the supreme court held that the standard of *Myers v. Alaska Psychiatric Institute*¹³⁷ governs whether the Office of Children's Services (OCS) may medicate a child against a parent's wishes.¹³⁸ The mother of a ten-year-old child in OCS custody refused to allow her son to be medicated by a psychiatrist to treat his behavioral problems and depressive symptoms. OCS sought, and the superior court issued, an order granting OCS the authority to consent to the psychiatrist's recommended administration of a particular antidepressant and additional mood stabilizer, and the mother appealed. On appeal, the mother argued that the superior court's findings of fact did not satisfy the *Myers* standard, which the superior court had refused to apply. The *Myers* test balances the importance of a fundamental constitutional right with the state's interest in limiting that right, requiring the state to show a compelling state interest and the absence of less restrictive means to advance the state's objective.¹³⁹ The supreme court agreed with the mother that the *Myers* standard protected her constitutional right as a parent to determine her child's medical treatments.¹⁴⁰ Nevertheless, applying *Myers*, the supreme court affirmed the lower court's decision to allow OCS to consent to

¹³⁵ 433 P.3d 1182 (Alaska 2018).

¹³⁶ 408 P.3d 1181 (Alaska 2018).

¹³⁷ 138 P.3d 238 (Alaska 2006).

¹³⁸ Kiva, 408 P.3d at 1183.

¹³⁹ Myers, 138 P.3d at 245–46.

¹⁴⁰ Kiva, 408 P.3d at 1186.

the administration of the antidepressant drug to the son. While the court found that medicating the son without his mother's consent substantially burdened the mother's constitutional rights, the court concluded that OCS had a compelling interest and that the antidepressant was the least intrusive available treatment. However, the supreme court reversed the superior court's authorization of the mood stabilizer, reasoning that, without observing the reaction and progress of the child to the antidepressant, it was too early to conclude that the mood stabilizer was the least-intrusive treatment available. Lastly, the court was unpersuaded by the mother's contention that finding she lacked capacity to consent, or that her refusal to consent was unreasonable, was necessary to overcome her parental rights. The court concluded that the *Myers* standard alone adequately those rights. Accordingly, in affirming the authorization of the antidepressant but reversing the authorization of the mood stabilizer, the supreme court held that the *Myers* standard applies to a court's decision to authorize medication for a child in the custody of OCS over a parent's objection.

Mat-Su Valley Medical Center, LLC v. Bolinger

In *Mat-Su Valley Medical Center, LLC v. Bolinger*,¹⁴¹ the Supreme Court held that the medical peer review privilege of section 18.23.030 of the Alaska Statutes protects complaint-related materials contained in peer review committee files, even if the materials originated outside the peer review process.¹⁴² A hospital invoked the peer review privilege in two separate actions, one involving a wrongful death suit against a physician at the hospital, and the other involving both a medical malpractice claim against the same physician and a negligent credentialing claim against the hospital.¹⁴³ In each case the superior court compelled the hospital to disclose materials related to complaints about the physician's conduct and the hospital's decision to grant the physician medical staff membership.¹⁴⁴ The superior court reasoned that materials regarding such complaints fell outside the peer review privilege because although they may later become evidence in a peer review proceeding, they are based on observations occurring in the normal course of rendering medical care and preceding the commencement of peer review.¹⁴⁵ The supreme court disagreed, finding that complaint-related materials contained in peer review committee files, the identities of the individuals reporting and reviewing the complaints, and any internal action taken in response satisfy the requirements for the privilege to apply.¹⁴⁶ For the privilege to apply, the materials must be acquired by a peer review committee in the exercise of its duties and functions, which includes evaluating and improving the quality of health care rendered in the hospital.¹⁴⁷ Here, Mat-Su employees are instructed to report concerns about physicians that implicate patient care to the committees.¹⁴⁸ Therefore, these complaints were acquired by a peer review committee in the exercise of its duties and functions.¹⁴⁹ Thus, the supreme court reversed the superior court's order compelling disclosure and held that the medical peer review privilege in section 18.23.030

¹⁴¹ 427 P.3d 754 (Alaska 2018), *reh'g denied* (Oct. 10, 2018).

¹⁴² *Id.* at 765.

¹⁴³ *Id.* at 757.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 765.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 765–66.

¹⁴⁸ *Id.* at 766.

¹⁴⁹ *Id.*

of the Alaska Statutes protects complaint-related materials contained in peer review committee files, even if the materials originated outside the peer review process.¹⁵⁰

¹⁵⁰ *Id.* at 768.

INSURANCE LAW

Hahn v. Geico Choice Ins. Co.

In *Hahn v. Geico Choice Ins. Co.*,¹⁵¹ the supreme court held that the “reasonable” interpretation of an insurance policy involves an examination of “(1) the language of the disputed provisions in the policy, (2) other provisions in the policy, (3) extrinsic evidence, and (4) case law interpreting similar provisions.” Hahn was stopped at a red light when Townsend struck the Hahn’s motorcycle, causing Hahn to momentarily landed on the hood, windshield, and roof of Townsend’s vehicle. Hahn believed that he was entitled to underinsured motorist (UIM) coverage because he “occupied,” as defined by GEICO’s policy, Townsend’s vehicle at the time of the collision. GEICO disagreed and filed suit against Hahn seeking a declaratory judgment that there was no UIM coverage available to Hahn because he was not in fact “occupying,” Townsend’s vehicle at the time of the collision. The superior court granted GEICO summary judgment. Hahn appealed. The supreme court stated that under Alaska law, insurance contracts are interpreted according to the “reasonable expectations” of the insured. Affirming the superior court’s summary judgment, the supreme court held that Hahn’s construction of “occupying” was not “reasonable” because of “(1) the language of the disputed provisions in the policy, (2) other provisions in the policy, (3) extrinsic evidence, and (4) case law interpreting similar provisions.”

Levi v. Dep’t of Labor & Workforce Development

In *Levi v. Dep’t of Labor & Workforce Development*,¹⁵² the Supreme Court of Alaska held that it is fraudulent for an individual to knowingly fail to report earnings over 50 dollars per week when collecting unemployment insurance benefits under section 23.20.360 of the Alaska Statutes. Levi received unemployment insurance benefits intermittently between 2010 and 2014. While receiving those benefits, he was also working part time in various teaching positions. To receive the benefits Levi filed a biweekly certification form, prepared according to a Department handbook he possessed which contained specific instructions. Despite being employed, Levi improperly stated he was not and so avoided reporting wages he had received for more than 50 weeks. Wages must be reported because the benefits received are reduced by 75 cents for every dollar earned over 50 dollars each week. The Department sent Levi a notice of determination on December 21, 2016 concluding that Levi had failed to report and had “grossly underreported” his work and earnings for the 50 weeks spanning from 2010 to 2014. It required Levi pay back the benefits, a total of \$25,122, and barred him from receiving further benefits for 52 weeks. Levi appealed the Department’s determination arguing, among other things, that he had reasonably interpreted the handbook to only require he report earnings greater than 50 dollars per day (instead of per week) due to its allegedly ambiguous wording. The Supreme Court of Alaska rejected this argument. It explained that regardless of whether the handbook was ambiguous, Levi had a duty to read the statute which was plain that the reporting requirement was based on weekly, not daily, earnings above 50 dollars. The court further found that even if failure to read the statute was excusable, the handbook was not ambiguous. Finally, the court concluded that even if the statute and the handbook had been ambiguous, Levi had acted fraudulently because under his interpretation of the reporting requirements he still failed to report wages for nine continuous weeks where he earned wages greater than \$50 per day. Affirming the superior court, the supreme court held that it is

¹⁵¹ 420 P.3d 1160 (Alaska 2018).

¹⁵² 433 P.3d 1137 (Alaska 2018).

fraudulent for an individual to knowingly fail to report earnings over 50 dollars per week when collecting unemployment insurance benefits under section 23.20.360 of the Alaska Statutes.

Ray Klein, Inc. v. Board of Trustees of the Alaska Electrical Health & Welfare Fund

In *Ray Klein, Inc. v. Board of Trustees of the Alaska Electrical Health & Welfare Fund*,¹⁵³ the district court held that state law insurance claims are preempted by ERISA when they are rooted in an ERISA plan's definition of the scope of covered charges. The Alaska Electrical Health and Welfare Fund ("Fund") was created under the Labor Management Relations Act and ERISA and provides healthcare benefits to Alaska's electrical workers and their dependents. The Fund entered into an agreement with several healthcare providers, including Providence Health and Services ("Providence"). After the premature birth of a pair of twins covered by the Fund, Providence billed the Fund for just over \$4 million on the basis of the agreement; the Fund refused to pay \$1.1 million of the bill. Providence, through Ray Klein, Inc. ("PCS"), brought a common law claim for breach of contract, but the Fund argued that the claim was preempted by ERISA. The district court explained that ERISA preempts state law claims related to an employee benefit plan ("Plan") provided under that title. The district court explained that a "relationship test" should be applied to determine if a claim relates to a Plan. This test focuses on whether the claims references and depends on an ERISA-regulated relationship. Under this test, the district court explained that the Fund's ERISA plan dictates the services the Fund covers for beneficiaries, so claims about the scope of that coverage necessarily relate to the existence of an ERISA regulated-relationship. Granting the Fund's motion for summary judgment, the district court held that claims regarding coverage are preempted where they are rooted in an ERISA plan's definition of the scope of covered charges.

¹⁵³ 307 F.Supp.3d 984 (D. Alaska 2018).

LEGAL ETHICS

In re Albertsen

In *In re Albertsen*,¹⁵⁴ the supreme court held that, as a result of an attorney's six ethical violations including failure to act with due diligence, failure to maintain adequate communication with a client, and failure to adequately communicate with the disciplinary committee, a two-year-and-one-day suspension was appropriate. Albertsen, an attorney in Alaska, represented a client seeking to foreclose on real estate properties. Albertsen represented this client from 2008 until 2016, during which time he failed to inform the client of significant changes to his client's matters, including fee increases and settlements. Albertsen's client obtained new counsel and in 2016 submitted a complaint to the Alaska Bar Association. Albertsen failed to adequately respond. As a result of these and other complaints, the disciplinary board, working with Albertsen's cooperation and consent, recommended he be suspended for two years and one day suspension, that he be ordered to pay costs, and that he be received continuing legal education and a psychological evaluation prior to reinstatement. The supreme affirmed the disciplinary board's finding of facts and analysis and ordered its recommended penalties be put into effect. Affirming the disciplinary board's recommendation, the supreme court held that, as a result of an attorney's six ethical violations including failure to act with due diligence, maintain adequate communication with a client, and adequately communicate with the disciplinary committee, a two-year-and-one-day suspension was appropriate.

In re Reger

In *In re Reger*¹⁵⁵, the supreme court adopted the recommendations of the bar association's disciplinary board, holding that violations of the ethics rules are properly attributed to an attorney when the violations occur due to improper delegation of authority to a non-attorney assistant, and inadequate supervision of that assistant. Lawrence Reger hired KW, a non-attorney, as a legal assistant. Over time, KW became a key part of Reger's practice, taking on responsibility for client communication. Reger also entrusted KW with filing documents at the court in a timely manner. When cash flow issues threatened the practice, Reger took a loan from KW, agreeing to share future profits with her 50-50. Eventually, Reger realized that communication with his clients was breaking down. He failed to appear in court on at least one occasion, and missed critical filing deadlines. These problems led two clients to file bar grievances against Reger. After reviewing those complaints, the disciplinary board found six violations of the rules: 1) Reger violated Rule 1.3 by missing deadlines and failing to appear. 2) Reger violated Rule 1.4 by turning over communication to KW, failing to notify clients of pending proceedings, and failing to tell one client his case had been dismissed. 3) Reger violated Rule 5.3 by failing to supervise KW to ensure her conduct conformed with the rules. 4) Reger violated Rule 5.4 by sharing profits with KW, a non-lawyer. 5) Reger violated Rule 1.15 by failing to account to a client upon request and failing to deliver funds to the client's new lawyer. 6) Reger violated Rule 1.16 when he failed to surrender client files and return unearned fees upon termination of representation. The disciplinary board recommended he be suspended for six months, ordered to complete nine hours of CLE, and required to pay \$1,000 in costs to the board. The supreme court adopted the board's analysis and ordered the recommended discipline be imposed, holding that violations of the ethics rules are

¹⁵⁴ 420 P.3d 1218 (Alaska 2018).

¹⁵⁵ 421 P.3d 25 (Alaska 2018).

properly attributed to an attorney when the violations occur due to improper delegation of authority to a non-attorney assistant, and inadequate supervision of that assistant.

PROPERTY LAW

Beecher v. City of Cordova

In *Beecher v. City of Cordova*,¹⁵⁶ the supreme court held that, upon the grant of a motion for an accounting, the burden falls on the nonmoving party to provide a proper accounting, even if there is a significant burden to do so. In 1997, the Beechers entered into a lease with the City of Cordova to operate a fueling facility on City-owned land. The Beechers fell behind on rent, eventually leading to their eviction in 2003. Upon vacating the premises, the Beechers left behind personal property, including vehicles, fuel tanks, and trailers. The City filed a creditor's affidavit stating that it would attempt to satisfy the judgment by selling some of the abandoned property. After two years, the City ceased collection efforts. Eight years passed, and when the City obtained a renewal judgment, the Beechers filed a motion in superior court seeking an accounting of the City's collection efforts, specifically, what had become of their personal property. The City responded that it had sold certain improvements from the fueling facility, and additionally that some of the property identified in the creditor's affidavit had been foreclosed upon and sold at auctions. The Beechers responded by providing a full list of personal property, most of which was not included in the City's initial accounting, that they valued at nearly three-quarters of the entire judgment. The superior court ruled that the original accounting was proper, and the supreme court heard the appeal. The supreme court agreed with the Beechers that the city's accounting was inadequate. It explained that the moving party must show that a relationship exists between itself and the nonmoving party, that the relationship requires an accounting, that a balance is due, and that the balance can only be ascertained by an accounting. Upon showing such facts, the burden falls on the nonmoving party to make a proper accounting. The City argued that the burden was too great, considering the passage of time, to make an accounting of all the listed property. The supreme court rejected this argument, reasoning that the Beechers had demonstrated facts necessary to establish the City's duty to account, and that a significant burden to conduct a proper accounting does not eliminate this duty. The court reversed the superior court's order denying the Beechers' motion for an accounting, holding that the burden is on the City to render a proper accounting, even though a proper accounting involves a significant burden.

Dickson v. State Dep't of Natural Resources

In *Dickson v. State Dep't of Natural Resources*,¹⁵⁷ the Supreme Court of Alaska held that RS 2477 rights of travel allow for public access to federal land intended for non-public use. In 1958, Benjamin Cowart homesteaded 160 acres, across the southern part of which his neighbor built Homestead Road without permission. The public began using this road year-round for various purposes, also without permission. Then, in 1983, the State notified Cowart that the Historic Iditarod Trail also crossed his property. Cowart soon learned the Iditarod trail race was scheduled to cross his property along that path the following year; he objected to this and posted a private property no-trespassing sign at the point the trail entered his land. In 2008, after inheriting the property from her father, Kelly Dickson also blocked off Homestead Road. When the public ignored the signs and barriers and continued to use both paths, Dickson filed a complaint to quiet title to the trail and the road that crossed her property. The lower court found the Historic Iditarod Trail followed an RS 2477 right of way because the trail had been established before Cowart

¹⁵⁶ 408 P.3d 1208 (Alaska 2018).

¹⁵⁷ 433 P.3d 1075 (Alaska 2018).

acquired title to the land, and that Homestead Road was a public prescriptive easement. The Supreme Court affirmed. It explained that section 8 of the Lode Mining Act of 1866 (repealed in 1976) allowed for the creation of RS 2477 right of ways on federal lands either through public acceptance, established through sufficient public use, or through manifestation of official intent, before the lands became privatized. It further explained that RS 2477 right of ways were explicitly limited to federal land “not reserved for public uses,” including lands intended for settlement by private parties. The court reasoned that the lower court had sufficient evidence to find that this had occurred for the sections of the Iditarod trail crossing the land before Cowart had converted it into private property. The court further found that the lower court had sufficient evidence to find that Homestead Road had been used by the public continuously, year-round, for at least 10 years, thereby establishing a public prescriptive easement. Because the supreme court found no clear error in the lower court’s factual findings, it affirmed, holding that RS 2477 rights of travel allow for public access to federal land intended for non-public use, and remanded only for further consideration of attorneys’ fees.

Keenan v. Meyer

In *Keenan v. Meyer*,¹⁵⁸ the supreme court upheld the superior court’s award of compensatory damages and full attorneys’ fees in a dispute between neighbors over an access easement and water rights, holding that the superior court’s findings of fact were not clearly erroneous and the district court did not abuse its discretion. The Keegans and Meyers each owned part of a subdivided lot (Lot 3) in the Macdonald Spit community. When the lots were subdivided, the original owners reached an agreement that created a ten foot access easement, which ran with the land, adjacent to the properties and granted the owners of both properties water rights to a well on the Keegans’ property. The Meyers purchased the lot next to the Keegans and began renovating their cabin, eventually making improvements to the access easement and the well. After bad feelings arose between the neighbors, the Keegans eventually blocked vehicle traffic from using the access easement and cut off the Meyers’ water. In the ensuing litigation, the superior court ruled in favor of the Meyers, awarding them compensatory damages for the loss of use of the easement, their property for the time it was without water, and the full attorneys’ fees incurred by the Meyers. The Keegans appealed claiming error in the calculation of damages and the award of all attorneys’ fees. The supreme court held that the calculation of damages was acceptable and that the award of damages for loss of use of both the easement and the property did not affect a double recovery, since the injuries were distinct. Based on consideration of the Rule 82(b)(3) factors, the court found that awarding full attorneys’ fees was appropriate because the Keegans acted in bad faith by bringing improper pressure to bear on the Meyers during the litigation by cutting off their easement and water rights. The superior court’s decision and award in favor of the Meyers was affirmed.

Reeves v. Godspeed Properties, LLC

In *Reeves v. Godspeed Properties, LLC*,¹⁵⁹ the supreme court held that Alaska law recognizes partial extinguishment of easements through prescription. After a series of property transfers, Reeves owned an easement on a piece of Godspeed’s property. Reeves offered to sell the easement to Godspeed, but the parties were unable to come to an agreement. Godspeed sued Reeves for quiet title, claiming that Reeves’ easement was invalid. The superior court held that Reeves’ easement

¹⁵⁸ 424 P.3d 351 (Alaska 2018).

¹⁵⁹ No. S-15461/15482, 2018 Alas. LEXIS 86 (Alaska, Jul. 13, 2018).

was valid, but used the standard previously established in *Hansen v. Davis*¹⁶⁰ to determine that the adverse presence of a gold plant terminated the easement by prescription.¹⁶¹ Reeves and Godspeed both appealed, with Godspeed arguing that the easement was not created because of ambiguities in the deed, and Reeves arguing that the easement was not extinguished by prescription, or alternatively that the easement should only be partially extinguished. The supreme court agreed that an easement existed, and agreed that the easement was extinguished on the location of the gold plant, but rejected the superior court's holding that the remainder of the easement was extinguished, reasoning that allowing for partial extinguishment by prescription leads to legal outcomes that better reflect reality. Affirming in part and reversing in part the superior court's decision, the supreme court held Alaska law recognizes partial extinguishment of easements through prescription.

Riddle v. Lanser

In *Riddle v. Lanser*,¹⁶² the supreme court held that the Right to Farm Act does not shield individuals from nuisance liability where the activity is not part of an “agricultural facility” or “agricultural operation at an agricultural facility” before becoming a nuisance. In 2005, Riddle acquired property covered by a farm conservation plan, and he used it to maintain some livestock, to produce some crops, and to store sewage in septage lagoons as part of his business pumping septic tanks. In 2007 Riddle obtained permits to spread septage on his fields, but he did not disclose he possessed septage lagoons so the permit was confined to sewage obtained elsewhere. In that same year, a real estate developer acquired adjacent property where it built and sold residences. In 2010, after Riddle began to accept sewage from septic companies beyond his own, residents of the adjacent property began complaining of the smell. In 2011 Riddle obtained an amended farm plan allowing him to maintain septage lagoons so long as the primary use of the property was agricultural and the septage lagoons were used for this agricultural use, and in December Lanser sued for nuisance. The superior court held in favor of the real estate developer, following a two-step analysis that first found the septage lagoons to be a nuisance, and second found that the lagoons were not “an agricultural facility or an agricultural operation” protected under the Right to Farm Act. The supreme court affirmed the nuisance holding, finding that the superior court did not clearly err in its findings first that the septage lagoons constituted a private nuisance. Second, it explained that the Right to Farm Act did not protect Riddle from nuisance liability because the nuisance arose prior to the septage lagoons’ actual or intended use for commercial agricultural purposes. Further, it explained that the limited agricultural activity on the property did not transform the initial non-agricultural use of the septage lagoons into a protected agricultural action. Affirming-in-part and reversing-in-part (as to fees) the supreme court held that the Right to Farm Act does not shield individuals from nuisance liability where the activity is not part of an “agricultural facility” or “agricultural operation at an agricultural facility” before becoming a nuisance.

¹⁶⁰ 220 P.3d 911, 912 (Alaska 2009).

¹⁶¹ 2018 Alas. LEXIS 86 at *8.

¹⁶² 421 P.3d 35 (Alaska 2018).

TORT LAW

In re Angelette, LLC

In *In re Angelette, LLC*,¹⁶³ the United States District Court for the District of Alaska determined that maintenance and cure claims are not subject to the Limitation of Liability Act, making the shipowner's duty to pay maintenance and cure virtually automatic. Jay Thomassen is the sole member of Angelette, LLC; a corporation that owned a ship, the Kupreanof, which sank during a fishing expedition. The Kupreanof's captain said that three days after the voyage began all of the ship's pumps were working, including the lazarette pump. However, at some point fishing gear had been stowed on top of the lazarette pump preventing the crew from checking whether water was entering it. When the vessel began to sink the captain was forced to make a Mayday call to the United States Coast Guard and abandon the vessel. The captain and crew were rescued before the Kupreanof sank completely, and after Angelette, LLC sued for a declaration of no liability they counter-claimed for maintenance and cure. Angelette, LLC then moved for summary judgment on those claims arguing that the Limitation of Liability Act does not require payment of maintenance and cure. The district court explained that maintenance and cure damages provide seamen with lodging and food when they become ill or injured while serving upon a ship; and it elaborated that these damages continues until the seaman recovers as much as he is able. Adopting reasoning of the 5th Circuit, the district court concluded that maintenance and cure is a distinct remedy from negligence or unseaworthiness and that the Limitation of Liability Act only applies to the latter remedies. As a result, recovery for maintenance and cure is virtually automatic. Rejecting the plaintiffs' motion for summary judgment, the court held that maintenance and cure claims are not subject to limitation on the Limitation of Liability Act.

Lane v. City of Juneau

In *Lane v. City of Juneau*,¹⁶⁴ the Supreme Court of Alaska held that a municipality and its employees do not share the same type of immunity for its decisions and actions. The City of Juneau ("the City") operated a campground that was normally closed for the winter. To accommodate the local homeless population, the City decided in the fall of 2009 to keep the campground open through the winter. A city official, Marlow, hired Gordon Valle as caretaker; his duties included administrative tasks and noise control but no law-enforcement. Though "the campground rules expressly prohibited alcohol," Marlow had told Valle that he could drink in his own tent and that the rule would only be enforced against people who were disruptive. One evening, Valle joined some other camp residents, became heavily intoxicated, and passed two of his guns around. Among the residents present were Jon Lane and Chris Barrios, who got into an altercation that ended with Barrios shooting Lane in the face with one of Valle's guns. Lane then sued the City, alleging it had been negligent in operating the campground and hiring Valle. Lane further alleged the City was vicariously liable for Valle's conduct. In granting the City's motions for summary judgment, the lower court held that the City was immune under the discretionary function doctrine and that the City was not vicariously liable for Valle's actions as they were "outside the scope of his contractual duties." The supreme court reversed explaining that while Marlow would be protected under official immunity, the discretionary function doctrine does not automatically apply the protection of an individual employee to the employing municipality. It

¹⁶³ 329 F. Supp. 3d. 814 (D. Alaska 2018).

¹⁶⁴ 421 P.3d 83 (Alaska 2018).

explained that though “municipal employees enjoy personal or ‘official’ immunity for any action involving ‘deliberation’ and ‘judgment,’ municipalities themselves enjoy immunity only for ‘planning’ decisions; they remain potentially liable for ‘operational’ decisions. . . .” The Supreme Court reversed the lower court’s grant of summary judgment on the issues of negligent supervision and vicarious liability holding that a municipality and its employees do not share the same type of immunity for its decisions and actions; it otherwise affirmed the superior court’s judgment and remanded the case for further proceedings.

Lindbo v. Colaska, Inc.

In *Lindbo v. Colaska, Inc.*,¹⁶⁵ the supreme court held that the trial court’s failure to give spoliation jury instructions was not plain error. On August 21, Lindbo, a truck driver who delivered asphalt from Colaska’s plant, arrived at the plant, stepped out of his truck, and turned his back to the machinery. The plant operator unsuccessfully attempted to get Lindbo’s attention over the sound of the machinery. To get his attention, the plant operator threw a can in Lindbo’s direction, but it struck Lindbo in the lower back. Lindbo went to the emergency room for medical treatment and later filed suit for battery and negligence. At trial, the jury awarded Lindbo over \$2,500 for compensatory damages for negligence but rejected his battery claim. Lindbo appealed, arguing that the superior court’s failure to give an adverse inference (spoliation) jury instructions based on Colaska’s failure to preserve the can that hit Lindbo was plain error. The court disagreed, finding that it was not plain error. Plain error exists when an obvious mistake has been made that creates a high likelihood that injustice has resulted. There must be a reasonable probability that the error affected the outcome of the proceeding. Although the parties disagreed about the size and weight of the can thrown at Lindbo, the court found that the weight of the can would not have changed any of the jury’s findings. The only possible finding that the can could have changed was Lindbo’s noneconomic loss award. However, the jury had ample testimony to make a noneconomic loss award and still declined to award any amount for medical expenses. Adding an adverse inference instruction likely would not have changed the award’s final amount. Thus, the supreme court affirmed and held that the trial court’s failure to give spoliation jury instructions was not plain error.

Shack v. Shack

In *Shack v. Shack*,¹⁶⁶ the supreme court held that Alaska’s bystander theory of liability does not permit recovery for negligent infliction of emotional distress (NIED) when the tortfeasor and the injured relative are the same person. In June 2014, Elizabeth Shack failed to yield the right-of-way at a stop sign causing an accident with her car and an oncoming truck. Elizabeth’s mother, Rachel, and brother, Dylan, were nearby the accident and rushed to the scene, where they saw Elizabeth seriously injured as a result of the crash. These injuries later led to Elizabeth’s death. In February 2015, her family (“the Shacks”) filed a bystander claim against Elizabeth’s auto-insurance policy through her estate for NIED, arguing that even though the deceased was also the tortfeasor, the family should still recover for its resulting emotional distress. The lower court denied this claim stating that NIED claims are invalid when the tortfeasor and the injured relative are the same individual. The supreme court affirmed the lower court’s decision, reasoning that bystander claims required the injury to be caused by a third party with no pre-existing relationship

¹⁶⁵ 414 P.3d 646 (Alaska 2018).

¹⁶⁶ 414 P.3d 639 (Alaska 2018).

to the bystander relatives of the injured party. Furthermore, the court found a new duty of care that would allow recovery should not be recognized. Affirming the lower courts ruling, the supreme court held that Alaska's bystander theory of liability does not permit recovery when the tortfeasor and the injured relative are the same person.

TRUST & ESTATES LAW

Boiko v. Kapolchok

In *Boiko v. Kapolchok*,¹⁶⁷ the supreme court held that the superior court did not abuse its discretion in calculating attorneys' fees under Alaska Civil Rule 82. Boiko and Picarella filed legal malpractice claims against Kapolchok after he represented them in a dental malpractice suit. They contended that Kapolchok withheld information about a favorable summary judgment ruling to induce them to settle the case. Kapolchok retained a second attorney to assist him in his defense. After a lengthy discovery process resulting in sanction of Boiko and Picarella, they dismissed their claims with prejudice while leaving the issue of attorney's fees open. After the superior court dismissed Kapolchok's Rule 68 offer of judgment, it proceeded to calculate the fees due him under Rule 82. Kapolchok argued that his fee award under Rule 82 should be enhanced from 20% to 50% based on the unreasonableness of Boiko's and Picarella's claims and "their vexatious and bad faith conduct throughout the litigation," while Boiko and Picarella argued Kapolchok's award should be reduced to zero for similar reasons. The superior court ultimately awarded Kapolchok Rule 82 attorneys' fees but reduced the award from 20% to 15% because it found Kapolchok acted unreasonably in paying two attorneys to defend an unremarkable legal malpractice suit, and to avoid deterring future plaintiffs. Kapolchok appealed, challenging the superior court's decision to reduce, rather than enhance attorneys' fees under Rule 82(b)(3). The supreme court affirmed. It explained that under Rule 82(b)(2), when a prevailing party recovers no money judgment and the case is resolved without trial, the court shall award the prevailing party 20% of its attorneys' fees. The court continued that this the award can be varied pursuant to Rule 82(b)(3) based on equitable factors, including the complexity of litigation and reasonableness of the number of attorneys used. Finally, the court noted that in reviewing Rule 82 awards it applies an abuse of discretion standard and so it will only reverse when the award is manifestly unreasonable. Under this standard, the supreme court determined that the superior court engaged in a proper analysis. The court noted that the superior court reviewed Kapolchok's itemized billing and the complexity of the case, that it had a better perspective on those issues than did the supreme court itself, and that consideration of chilling future plaintiffs is permitted under the Rule 82. Thus, the supreme court affirmed and held that the superior court did not abuse its discretion in reducing attorneys' fees from 20% to 15% under Rule 82.

Cottini v. Berggren

In *Cottini v. Berggren*,¹⁶⁸ the supreme court held that former agents may be entitled to attorney's fees for defending against their former principal's challenge to the agent's accounting of costs of their former guardianship-relationship. Cottini acted as Berggren's guardian after Berggren suffered a traumatic brain injury. After Berggren recovered, Berggren objected to Cottini's accounting of fees and costs. Cottini hired an attorney to defend him from the objection, and the parties eventually settled. After settlement, Cottini filed a motion requesting attorney's fees incurred during the defense. The superior court denied the motion, concluding that section 13.26.291(d) of the Alaska Statutes governed fee-shifting in a guardianship case and that it only would only allow award of attorney's fees if Berggren's challenge to the accounting had been malicious or frivolous, which it was not. The supreme court determined that section 13.26.291(d),

¹⁶⁷ 426 P.3d 868 (Alaska 2018).

¹⁶⁸ 420 P.3d 1255 (Alaska 2018).

various other sections of the Alaska Statutes, and ALASKA R. CIV. P. 82 did not apply to the case so they neither prevented nor justified an award of attorney's fees. It elaborated that the under the common law of agency a principal has a duty to indemnify his agent for expenditures beneficial to the principal. The supreme court explained that accordingly equity and public policy weigh in favor of allowing a recovery of attorney's fees if factors indicate the expenditures were beneficial to the principal. The supreme court specified these factors include the amount of attorney's fees, the relative amount of assets in question, the merits of the parties' arguments, the extent that the defense was related to the best interests of the principal, and the duration, extent, and expense of the defense. Reversing and remanding for consideration of these factors, the supreme court held that a former agent in a guardianship relationship may be entitled to attorney's fees for defending against his former principal's challenge to the agent's accounting.

Hester v. Landau

In *Hester v. Landau*,¹⁶⁹ the Supreme Court of Alaska held that only a personal representative of an estate has the power to appear in court on behalf of the estate. Aurora Landau sued her former employer for unpaid compensation, naming the company and its two owners as defendants. One of the owners died while the case was pending, and Landau substituted his estate in her complaint. After the lower court ultimately ruled in favor of Landau, Tracy Hester, the deceased's widow and sole beneficiary of his estate, moved for relief from the judgment based on improper service. She argued that as the sole-beneficiary of the estate her financial interest was identical to its interest and that she therefore possessed interest-injury standing. On appeal, the supreme court rejected this argument and affirmed the lower court's judgment. The court found that though Hester was an interested person under Alaska's probate law, she was not a personal representative of the estate and so lacked standing to sue on its behalf. The court explained that the probate code is careful to ensure there is no lapse in coverage between different personal representatives of an estate, and that it also provides other remedies to interested persons short of authorizing them to act as legal representatives. From this the court concluded that these provisions would not exist if someone other than a personal representative could take legal action on behalf of an estate. Affirming the lower court's judgment, the supreme court held that only a personal representative of an estate has the power to appear in court on behalf of the estate.

In re Estate of Seward

In the case *In re Estate of Seward*,¹⁷⁰ the supreme court held that purported children of a decedent intervening in probate preceding are not required to bring a separate paternity cause of action. Seward died in May 2013 after executing a will in 2008 that declared he had no spouse or children. In an October 2013 probate proceeding Vincent Mock asserted that Seward was his father. The superior court ruled that paternity determinations could not be made in probate proceedings and that Vincent was not interested parties, barring him from the proceedings. In an earlier appeal, the supreme court determined that Vincent was not entitled to relief as a pretermitted heir, but it noted that, if he was Seward's son, Vincent might be entitled to a statutory allowance. After the supreme court ordered supplemental briefing on the issue, the superior court ruled that Vincent's claim to parentage was distinct from his claim to a property allowance and that it was therefore barred by a statute of limitations. The supreme court reversed, reasoning that, despite caselaw previously

¹⁶⁹ 420 P.3d 1285 (Alaska 2018).

¹⁷⁰ 424 P.3d 333 (Alaska 2018).

referring to paternity determinations as “paternity actions,” paternity determinations are elements of other claims rather than separable causes of action. The court elaborated that paternity determinations may be conducted as part of a claim on an estate and so are subject to the time constraints of the probate code rather than a separate statute of limitations. Concluding that various time-limits on probate proceedings did not apply or had not run, the supreme court reversed and remanded, holding that paternity claims may be brought in conjunction with probate proceedings as they do not constitute a separate cause of action.